In The

Supreme Court of the United States

October Term 1976

No. 76-.....

76-7061

MARITIME TERMINALS, INC. AND
AETNA CASUALTY AND SURETY CO.,
Petitioners,

v.

DONALD D. BROWN AND
VERNIE LEE HARRIS AND
THE SECRETARY OF LABOR, AND
UNITED STATES DEPARTMENT OF LABOR,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

OPINION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT SITTING EN BANC

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 75-1051

I.T.O. Corporation of Baltimore, Employer, and
Liberty Mutual Insurance Company, Carrier,
Petitioners,

v.

Benefits Review Board, U.S. Department of Labor,
Respondent,

William T. Adkins,
Respondent,

International Longshoreman's Association,
Amicus Curiae.

No. 75-1075

Maritime Terminals, Inc., and
Aetna Casualty and Surety Co.,
Petitioners,

v.

Secretary of Labor, and Donald D. Brown,
Respondents.

No. 75-1196

Maritime Terminals, Inc., and
Aetna Casualty and Surety Co.,
Petitioners,

v.

Vernie Lee Harris, and
United States Department of Labor,
Respondents.

No. 75-1088

National Association of Stevedores, et al.,
Petitioners,

v.

Benefits Review Board, U.S. Dept. of Labor,
Respondent,

William T. Adkins,
Respondent.

On Rehearing In Banc.

Argued May 4, 1976 Decided Aug. 26, 1976

Before Haynsworth, Chief Judge, Winter, Craven, Butzner, Russell and Widener, in banc.

* * *

Winter, Circuit Judge:

These consolidated appeals present two major questions: (1) the extent of coverage of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.* (sometimes "LHWCA"), to persons engaged in the necessary steps in the overall process of

loading and unloading a vessel but who, prior to the Amendments, could claim benefits for accidental injury or death, sustained in the process, only under state law; and (2) whether, in a petition for review under 33 U.S.C. § 921(c), the Director, Office of Workers Compensation Programs, Department of Labor, is a proper respondent. The appeals were first heard and decided by a divided panel of the court. I.T.O. Corp. v. Benefits Review Bd., 529 F.2d 1080 (4 Cir. 1975). Chief Judge Haynsworth and I comprising the majority, held that during the loading and unloading process the coverage of the Act extended to the first (last) point of rest. As applied to the facts, this holding resulted in the conclusion that none of the three claimants was entitled to benefits. Judge Craven was of a contrary view. He would have held that the three claimants were engaged in maritime employment on navigable waters of the United States, as defined in the Act, and hence they should be entitled to benefits under the Act for their accidental injuries. The panel was unanimous in deciding that the Director was not a proper respondent, although it was recognized that, in a proper case, he might be permitted to become an intervenor.

Because of the importance and novelty of the questions decided, the entire court granted cross-petitions for rehearing and reheard the appeals in banc. At the time the appeals were reargued, the in banc court consisted of six judges.

I.

On the issue of the extent of the Act's coverage, Chief Judge Haynsworth, Judge Russell and I subscribe to the views expressed in the majority panel decision. Judge Widener subscribes to the principle expressed in that opin-

ion, although he defines the exact point between coverage and non-coverage somewhat differently.

In his application of the principle, Judge Widener concludes that the claimant Adkins is not covered by the Act, but that claimants Brown and Harris are covered. He reasons that the test of coverage is whether an otherwise eligible employee is injured while engaged in loading or unloading a ship; coverage would not extend to activities for transshipment of goods removed from a ship or goods destined for a ship. In Adkins' case, a container was removed from the ship and stored in the marshaling area. From there the container was moved to a shed where it was stripped and the contents were stored. Adkins was injured when he was moving the contents from the storage area onto a waiting delivery truck. The cargo was no longer being unloaded from the ship but was in the process of being loaded into a delivery truck. Adkins, in Judge Widener's view, was thus not covered because he was not participating in the unloading process; he was handling the goods for transshipment. Accordingly, Judge Widener concurs in the judgment of Chief Judge Haynsworth, Judge Russell and me to reverse Adkins' award.

In Brown's case, the cargo was brought from somewhere inland and deposited in a warehouse. Brown, operating a forklift, picked up cargo and stuffed it into a container. While stuffing the container, Brown was injured. When the stuffing would have been completed, a hustler would have carried the container to the marshaling area, and from there the container would have been taken to the pier to be loaded on board. Thus, in Judge Widener's view, Brown was engaged in the overall process of loading the ship. The cargo was not merely being moved to storage for convenience or facility; the cargo was in the process of being loaded on

board ship, and Brown was engaged in the loading process. Accordingly, Judge Widener concurs in the judgment of Judge Craven and Judge Butzner to sustain the award made to Brown.

Harris was a hustler who was injured while he was taking a container, stuffed with goods which had been stored after inland delivery, from the stuffing area to the marshaling area. From the marshaling area, the container would have been taken to the pier where it would have been loaded on board. The goods were being moved solely for loading purposes, not for mere convenience, and therefore, in Judge Widener's view, Harris, like Brown, was engaged in the overall process of loading the ship. Accordingly, Judge Widener concurs in the judgment of Judge Craven and Judge Butzner to sustain the award made to Harris.

Judge Craven and Judge Butzner subscribe to the views expressed by Judge Craven in his dissenting panel opinion, and for those reasons and the additional reasons expressed by Judge Butzner in his separate opinion attached hereto, they vote to affirm the awards made to Adkins, Brown and Harris.

By the majority votes of Chief Judge Haynsworth, Judge Russell, Judge Widener and me, the award to Adkins (Nos. 75-1051 and 75-1088) is reversed. By an equally divided court, the awards to Brown and Harris (Nos. 75-1075 and 75-1196) are affirmed.

II.

On the issue of whether the director is a proper respondent, an issue raised only in Nos. 75-1051 and 75-1088, Chief Judge Haynsworth, Judge Russell, Judge Widener and I subscribe to the views expressed in the majority panel decision as hereafter amplified. Judge Craven and Judge

Butzner subscribe to the views expressed in Judge Butzner's separate opinion attached hereto.

III.

Chief Judge Haynsworth, Judge Russell, Judge Widener and I amplify our conclusion that the Director is not a proper respondent as follows:

Prior to the 1972 Amendments, the Act provided for judicial review by an injunction suit against the deputy commissioner making a compensation award. The pertinent part of 33 U.S.C. § 921(b) (1970), *as amended,* 33 U.S.C. § 921(c) (1976 Supp.), provided:

> If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, and instituted in . . . the judicial district in which the injury occurred . . . .

One of the 1972 Amendments revised § 921 so that subsection (c), the counterpart of the previous subsection (b), now provides:

> Any person adversely affected or aggrieved by a final order of the Board may obtain a review of that order in the United States Court of Appeals for the circuit in which the injury occurred, by filing in such court . . . a written petition praying that the order be modified or set aside. A copy of such petition shall be forthwith transmitted . . . to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings . . . .

Certainly the deputy director was a party to pre-1972 litigation, but neither he nor his counterparts is expressly designated as a party by the 1972 Amendments. The legislative history is unenlightening as to the reason for this omission. While it is true that old § 921a[1] provided that the United States Attorney would represent the Secretary or the Deputy Commissioner in any court proceedings under old § 921, and that § 921a was continued by the 1972 Amendments although modified to permit the Secretary to appoint his own counsel,[2] the legislative history is again unenlightening. To conclude from the mere existence of new § 921a that the Secretary, or his designee, the Director, is automatically a party to a review proceeding is to beg the question. This section's existence can as well mean only that if otherwise made a party, *e.g.*, by intervention in a review proceeding, the Secretary or Director will be represented by attorneys appointed by him.

Indeed, § 939(c)(1), added by the 1972 Amendments, suggests the latter reading. It provides that "[t]he Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim." It would be a redundancy for the Secretary to be authorized

[1] 33 U.S.C. § 921a, *as amended,* 33 U.S.C. § 921a (1976 Supp.):

> In any court proceedings under section 921 of this title or other provisions of this chapter, it shall be the duty of the United States attorney in the judicial district in which the case is pending to appear as attorney or counsel on behalf of the Secretary of Labor or his deputy commissioner when either is a party to the case or interested, and to represent such Secretary or deputy in any court in which such case may be carried on appeal.

[2] 33 U.S.C. § 921a (1976 Supp.):

> Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 921 of this title or other provisions of this chapter except for proceedings in the Supreme Court of the United States.

to provide legal services to a prevailing claimant if the Secretary himself was intended actively to litigate to sustain an award.[3] Thus, unlike the pre-1972 Act and numerous other laws providing for judicial review or orders of administrative agencies,[4] the LHWCA, as amended in 1972,

[3] We fail to understand how the Director's statutory duty to provide legal assistance to claimants confers upon him a stake in the proceedings independent of that of any claimant, as apparently urged by the dissent. The issue we confront is not whether the Director may appear before us as Adkins' representative, but whether the Director may participate in his own behalf.

We also note that we find nothing in the statute or its legislative history to indicate that the availability of legal assistance to claimants may be made to turn upon whether the Director agrees or disagrees with the decision which a claimant seeks to appeal, as the dissent appears to suggest, *infra,* slip opinion at 20 ("*If he deems the decision erroneous,* his statutory duty to assist the claimant includes seeking review.").

[4] Most other statutes providing for judicial review of agency action are simply not analogous to the LHWCA because under them true adversity exists between the claimant of a *government* benefit and the government agency which seeks to withhold it. Thus, when review of agency action is sought by an unsuccessful applicant for a license before the FCC, *see* 47 U.S.C. § 402, or an unsuccessful applicant for a rate increase before the FPC, *see* 16 U.S.C. § 825*l*(b), or an unsuccessful claimant for Supplemental Security Income before the Secretary of H.E.W., *see* 42 U.S.C. §§ 405(b), 1383(c)(3), it is clear that the agency must be named a respondent since *it* is the party against whom relief is sought; the court could not grant an effective remedy without its presence. (Conversely, these agencies would never have reason to seek review of their own decisions.) In LHWCA cases, on the other hand, it is the private employer or insurance carrier which will have to pay any award which may be entered.

The Labor-Management Relations Act is more nearly similar to the LHWCA, since under it, as under the LHWCA, disputes are adjudicated between antagonistic private parties. And the NLRB may be called upon to defend its decisions in court. *See* 29 U.S.C. § 160(f). However, the NLRB's status as a party in the courts of appeals derives from its enforcement powers. *See id.* ("Upon the filing of such petition [for review], the court shall proceed in the same manner as in the case of an application by the Board under subsection (e) of this section [granting the Board power to enforce its decisions in court], and shall have the same jurisdiction . . . to make and enter a decree enforcing, modifying . . . or setting aside in whole or in part the

does not on its face make the director a respondent to a petition to review under § 921(c).

Since the Act is not specific, it follows that, if the Director is to be a party, he must be a "person adversely affected or aggrieved by a final order of the Board" within the meaning of § 921(c). Whether he is or is not is a question closely akin to the issue of whether the "case or controversy" requirement of Article III of the Constitution has been met.

Generally, to be adversely affected or aggrieved under the statute or to present a case or controversy under the Constitution, one must have suffered "injury in fact, economic or otherwise." *See* K. Davis, Administrative Law (1970 Supp.) § 22.00-1 at 706; 3 *id.* § 22.02. Therefore, to be a party before this court, the Director must have some concrete stake in the outcome of the case.

The Director asserts he has the requisite stake because

> [h]e is directly affected in his official capacity by the correctness of the Board's decision involving the proper scope of coverage of the Act with whose administration he is charged as the designee of the Secretary of Labor.

The Secretary of Labor's administrative duties, delegated to the Director, *see* 20 C.F.R. § 701.202, are set out in 33

order of the Board"). Thus, like the FCC, the FPC, the Secretary of H.E.W. and other agencies, the NLRB is an adverse party in court because adjudication is being sought of *its* right to grant relief in behalf of the prevailing party before it. The Director, Office of Workmen's Compensation Programs has no enforcement powers comparable to those of the NLRB.

Moreover, it is not the decision of the Director which is called into question by a petition for review under 33 U.S.C. § 921(c), but that of the Benefits Review Board. Thus, the Director does not possess even a concrete interest in defending his *own* decision in court, as does, for example, a district judge against whom a writ of mandamus is sought. As we noted in the majority panel opinion, the Benefits Review Board has specifically asked that it *not* be denominated a party respondent in these proceedings. To that request, we acceded.

U.S.C. § 939. Subsection (c)(1) is most arguably relevant to the Director's stake in the Board's decisions:

> The Secretary shall, upon request, provide persons covered by this chapter with information and assistance relating to the chapter's coverage and compensation and the procedures for obtaining such compensation and including assistance in processing a claim. The Secretary may, upon request, provide persons covered by this chapter with legal assistance in processing a claim. The Secretary shall also provide employees receiving compensation information on medical, manpower, and vocational rehabilitation services and assist such employees in obtaining the best such services available.

But we do not think that these duties provide the requisite stake. They do not confer upon the Director any specific interest in the proper administration of the Act.

In United States ex rel. Chapman v. F.P.C., 191 F.2d 796, 799-800 (4 Cir. 1951), *rev'd,* 345 U.S. 153 (1953), we held that the Secretary of the Interior lacked standing to challenge an order granting a license to a private company to construct a dam. The Secretary claimed to be affected by the order because it was his statutory duty to market surplus electrical power from publicly constructed dams. The Supreme Court reversed without opinion on this point, upholding standing. 345 U.S. at 156. *See* 3 K. Davis, supra, § 22.15 at 280.

The Director asserts that *Chapman* supports his position before us, but we disagree. The Secretary of the Interior in *Chapman did* have some stake in the outcome: it would have been harder for him to market public power if another private dam was built. Alternatively, if the private project was disapproved, it would have been more likely that a

public dam would eventually have been built, in which case the Secretary would have had more power to market. Thus, regardless of whether the Secretary was faced with a surplus or a shortage of electrical power to market under his statutory authority, the FPC's decision would directly affect him in the performance of his marketing obligations. The Director in this case has no such specific interest. Therefore, we read *Chapman* to suggest that the Director does not have a stake in the outcome and cannot be a party.

The lack of a stake in the outcome on the part of the Director would appear to end our inquiry. The Director argues, however, that because he is a party to proceedings before the Board, 20 C.F.R. § 801.2(10), it would be anomalous if he were not a party before this court. There are several answers to this argument. First, of course, that the Director is a party to proceedings before the Board does not alter the fact that he has no direct stake in the outcome of the case, is not a person aggrieved by Board action and is thus without a case or controversy to assert. Second, the fact that one is permitted to be a party to administrative proceedings does not require that one be entitled to initiate judicial review of those proceedings:[5] in the former case,

[5] While the Director here seeks to be named a *respondent* to a petition for review, a holding that he is a "person aggrieved" whose presence insures proper adversity would necessarily lead to the conclusion that he is entitled to petition for review of a decision of the Benefits Review Board of which he disapproves: if the Director has an interest in sustaining a Board decision with which he agrees, then he also has an interest in overturning a decision with which he disagrees. We would not readily subject the LHWCA to a construction under which the official charged with administering the Act could invoke the aid of the federal courts to reverse the decision of the board responsible for adjudicating claims under the Act. The unfairness of such a result is manifest if one contemplates the possibility that in some future case the Director, in furtherance of his asserted interest in determining "the proper scope of coverage of the Act," might seek to reverse an award to a claimant on the ground that the Board had been too generous.

the participant may perform a useful role by calling to the administrative agency's attention considerations it could not on its own initiative, much in the way that an intervenor would in this court; in the latter situation, however, the hopeful party is seeking to initiate a new level of proceedings because of dissatisfaction with the result below. *See* 3 K. Davis, supra, § 22.08 at 242.

Finally, it would appear even from the regulations implementing the Act that the Director is not *automatically* to be a party in this court, even though he is automatically a party before the Board. In 20 C.F.R. § 801.2(10), "party" is defined as follows: "the Secretary or his designee *and* any person or business entity aggrieved or directly affected by the decision or order from which an appeal to the Board is taken." (Emphasis added.) However, 20 C.F.R. § 802.410 provides: "any *party* adversely affected or aggrieved by such decision [of the Board] may take an appeal to the U.S. Court of Appeals . . . ." (Emphasis added.) Thus, the Secretary is a "party" before the Board even if he is not "aggrieved"; but to be entitled to participate in court proceedings, the Secretary, although a "party" below, must, like any other "party," be adversely affected.

In summary, we stand firm in our conclusion that the Director is not automatically a respondent in a review proceeding under § 921(c).

In our earlier opinion, we added that we did not decide that "a court of appeals may not, in a proper case, permit intervention by others [including the Director] who have an interest at stake . . . ." We elaborate on that comment: The Director unquestionably has a right to seek to intervene under Rule 24(b), Fed. R. Civ. P.,[6] and an application

[6] The Federal Rules of Civil Procedure principally govern procedure in the United States district courts in suits of a civil nature, Rule 1, but Rule 81(c) makes them applicable also to review proceedings under the Act to the extent that the Act does not prescribe procedure.

will ordinarily be granted. See 3B J. Moore, Federal Practice ¶ 24.10[5]; 7A C. Wright & A. Miller, Federal Practice and Procedure § 1912. The Director has not, however, sought intervention in these cases. We assume that he has not done so because he does not wish to render moot his assertion that such a request on his part is unnecessary. Having decided that such a request is necessary, we will still consider such a request on his part should he be advised to make it.

Nos. 75-1051 and 75-1088—REVERSED.
Nos. 75-1075 and 75-1196—AFFIRMED.
Each Party to Pay His Own Costs.

Butzner, Circuit Judge, dissenting:

I

I believe that the Director, Office of Workmen's Compensation Programs, should be recognized as a party to these proceedings. This issue raises a simple question of statutory construction. In 33 U.S.C. § 939(c), Congress authorized the Secretary of Labor to assist claimants and to provide them legal assistance. This statute must be read along with 33 U.S.C. § 921(a), which provides that attorneys appointed by the Secretary shall represent him before the courts of appeals. The Secretary has properly delegated his responsibilities to the Director.

Regulations under the Act establish the Director as a party before the Benefits Review Board, 20 C.F.R. § 801.3 (10). His stake in the proceedings arises out of the duty imposed by 33 U.S.C. § 939(c)(1) to assist claimants. Thus, the Director, like any other party before the Board, is aggrieved within the meaning of 33 U.S.C. § 921(c) by an adverse decision of the Board. If he deems the decision

erroneous, his statutory duty to assist the claimant includes seeking review. If the decision favors the claimant, the statute authorizes the Director to support the award on review.

In sum, the Act expressly places on the Secretary or his designee, the Director—not upon the courts of appeals—the responsibility of determining when the Director should participate in the review of the Board's orders. Congress did not condition the Director's appearance in our court on our granting or withholding pemission.

The difference between the Director's status as a permissive intervenor and as a party is more than a technical nicety. The majority rule, as I see it, will create roadblocks to filing petitions for review and certiorari, and it will provoke extended litigation over whether the Director's position in a given case satisfies the requirements of Rule 24(b). Other circuits have wisely recognized the Director's status as a party. *See, e.g.,* Pittston Stevedoring Corp. v. Dellaventura, No. 76-4042 (2d Cir. March 16, 1976); McCord v. Cephas, No. 74-1948 (D.C. Cir. March 25, 1975). I am not persuaded that we should differ from their sound conclusions.

II

I fully agree with Judge Craven that the point of rest theory espoused by the majority of the court is a judicial gloss on the 1972 Amendments of the Longshoremen's and Harbor Workers' Compensation Act, which is warranted by neither the Act nor its legislative history. *See* I.T.O. Corp. v. Benefits Review Board, 529 F.2d 1080, 1089 (4th Cir. 1975) (Craven, J., dissenting). I add only these brief observations. A careful study of the majority opinion filed when this case was heard by a panel, *I.T.O. Corp.,* 529

F.2d at 1081, discloses that the effect of the point of rest theory is to deprive longshoremen of coverage under the Act when they are injured while stuffing or stripping a ship's containers at a marine terminal. The slight modification of the theory in the majority's per curiam opinion alleviates some, but not all, of its harsh results. It does so, however, at the expense of adding the factor of lapse of time to the vague concept of place for determining the point of rest. Rational, uniform application of the court's theory to the myriad circumstances in which injuries occur will be most difficult.

Judge Craven initially voted with the majority to deny the Director standing as a party to these proceedings. On en banc reconsideration, he is now persuaded otherwise, and concurs in Judge Butzner's opinion.

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APPENDIX B

OPINION AND JUDGMENT OF A PANEL OF THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

UNITED STATES COURT OF APPEALS
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No. 75-1051

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National Association of Stevedores, et al.,
Petitioners,

v.

Benefits Review Board, U.S. Dept. of Labor,
Respondent,

William T. Adkins,
Respondent.

On Petition for Review of the Order of the Benefits Review Board.

Argued August 21, 1975. Decided December 22, 1975.

Before Haynsworth, Chief Judge, Winter and Craven, Circuit Judges.

* * *

Winter, Circuit Judge:

These appeals present the question of first impression of the extent to which the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901 *et seq.*, extend benefits under the Act to persons engaged in necessary steps in the overall process of loading and unloading a vessel, but who, prior to the Amendments, could claim benefits for accidental injury or death only under state law. The Administrative Law Judge and the Benefits Review Board of the Department of Labor held that benefits under the Act had been extended to all persons handling cargo or performing related functions in the terminal area. We disagree, and reverse each of the three awards in these cases.

We conclude that the Act's benefits extend only to those persons, including checkers, who unload cargo from the ship to the first point of rest at the terminal or load cargo from the last point of rest at the terminal to the ship. While the 1972 Amendments do extend the benefits of the Act to some persons who were not previously eligible, coverage is limited by the concept of "maritime employment," and not every person handling cargo between ship and point of discharge to the consignee or point of receipt from the shipper is engaged in "maritime employment." On the facts we conclude that these three claimants were not. The 1972 extension of coverage was intended only to remove inequities and anomalies arising when a person otherwise engaged in "maritime employment" was injured on land.

A subsidiary question in Nos. 75-1051 and 75-1088 is raised by the motion of Benefits Review Board, Department of Labor, to substitute the Director, Office of Workers' Compensation Programs, Department of Labor, as to which is the proper respondent in a petition to review under 33

U.S.C. § 921(c). We think that neither is a proper party to the proceedings. We therefore deny the Board's motion to substitute, and dismiss the Board. We will treat the Director as *amicus curiae*.

I.

The awards presented for review were made to William Adkins, who was injured at Dundalk Marine Terminal in the Port of Baltimore, and to Donald D. Brown and Vernie Lee Harris, both of whom were injured at Maritime Terminals, Inc., the lessee and operator of Norfolk International Terminals in Norfolk, Virginia.

A. Adkins was a forklift operator and he sustained his injuries while he was moving a load of brass tubing from its storage place in a warehouse to a waiting delivery truck which would transport it to its ultimate destination. He performed a function in the overall unloading of the ship and discharge of its cargo from the terminal. The tubing had arrived at the terminal some seven days earlier aboard the SS American Legend, packed in a container. The container had been removed from the vessel and immediately taken from the ship's side to a marshaling area one-half to three-quarters of a mile away where it was stored with other containers. The ship sailed on the same day that it had docked. Three days later the container was moved 1,000-1,200 feet to a warehouse or transit shed, known as Shed 11, where the container was "stripped," *i.e.*, unloaded, and the brass tubing stored to await transportation to its destination. The delivery truck did not arrive until four days later, and shortly thereafter Adkins was injured loading the tubing into it with his forklift.

Shed 11 was 685 feet from the water's edge. It was not

connected geographically or functionally with the ship's berthing area, and ships were neither loaded nor unloaded from it.

B. Brown suffered carbon monoxide poisoning while he was engaged as a forklift operator at Marine Terminals. He performed a function in the overall loading of cargo on board a ship. He operated his forklift in a warehouse where cotton piece goods and barrels of chemicals had been deposited after delivery by truck or rail. His job was to move loads of these items from their storage place to a container which was then "stuffed," *i.e.*, loaded with the items he had moved.

After a container was fully loaded, it was sealed and moved by another vehicle, called a "hustler," to a marshaling area adjacent to the pier. The container would then be lifted from the "hustler" and placed in a stack with other containers to await the arrival of a ship. When the ship arrived the container would be loaded aboard. Brown took no part in these latter operations. They were performed by persons other than employees of Marine Terminals. At no time was Brown required to board a ship. The warehouse in which he worked was 850 feet from the water's edge.

C. Harris was injured when the brakes failed on a "hustler" which he was operating and it collided with a container. He, too, performed a function in the overall loading of a ship; his was the next after that performed by Brown. Harris moved the containers from the long-term container storage area to the container marshaling area adjacent to the pier. He had just deposited a container at the container marshaling area and was on the return trip to the long-term container storage area to pick up another container when his brakes failed. No ship was present at the pier at the time, and the containers in the marshaling

area were not scheduled to be loaded aboard a vessel until later in the day when one was scheduled to arrive.

II.

The awards were made under § 3(a) of the Act, 33 U.S.C. § 903(a) (1975 Supp.), which, in pertinent part and with italics to show the Amendments made in 1972, provides:

> Compensation shall be payable . . . in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*) . . . .

The meaning of the words "employee" and "employer" is found in § 2(3) and (4), 33 U.S.C. § 902(3) and (4) (1975 Supp.), and these subsections, with italics to show the 1972 Amendments, provide:

> (3) The term "employee" *means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker,* but such term does not include a master or member of a crew of any vessel, *or* any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.
>
> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters

> of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel*).

Prior to 1972,[1] benefits were payable under the Act to any person (except a master or member of a crew or a person loading or unloading a vessel under eighteen tons net) if he was injured "upon the navigable waters of the United States (including any dry dock) and if recovery for the disability through workmen's compensation proceedings [could] not validly be provided by State law," with certain exceptions not material here. The pre-1972 Act thus did not distinguish among employees depending on the function they performed. Instead, the geographical location of the injury was all-important, with coverage stopping at the water's edge.

Sections 2 and 3 of the present Act establishes a dual test for coverage. The situs requirement has been retained, with the definition of "navigable waters" expanded to include certain specified land areas. In addition, a new "status" test has been added: the person injured ("employee") must have been engaged in "maritime employment," a concept

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[1] The 1972 Amendments to §§ 2 and 3 were only part of a broad overhaul of the Act. Other amendments substantially increased the maximum and minimum benefits which could be awarded; accomplished a legislative overruling of Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946), which permitted a longshoreman to recover damages from a ship resulting from the ship's unseaworthiness; and effected a legislative overruling of Ryan Stevedoring Co. v. Pan Atlantic S.S. Corp., 350 U.S. 124 (1956), under which a ship could recoup from a longshoreman's employer the damages it was required to pay the longshoreman for injuries he suffered due to the unseaworthiness of the ship, on the theory that the employer breached an expressed or implied warranty of workmanlike performance.

which is nowhere defined but which includes "longshoring operations." The net effect of the 1972 Amendments was therefore to *broaden* the area in which an injury would be covered, and *narrow* the class of persons eligible according to job function.

Section 4 of the amended Act, 33 U.S.C. § 904, limits liability for compensation to an "employer" as defined in § 2(4), 33 U.S.C. § 902(4). The definition is so drafted that it appears that an employer will always be liable for his "employees'" covered injuries. It therefore does not prescribe another, additional test for coverage.

III.

We have no doubt that each of the claimants satisfies the situs test of the post-1972 Act. As a minimum, they were injured at a terminal, adjoining navigable waters, used in the overall process of loading and unloading a vessel. The difficult issue is whether they also satisfy the status test—were they engaged in "maritime employment," or may they be deemed longshoreman or persons engaged in longshoring operations within the meaning of the Act?

The meaning of the terms "maritime employment," "lonshoreman" and "persons engaged in longshoring operations" is not so fixed and certain that the Act alone provides the answer. "Maritime employment" is a phrase that embodies the concept of a direct relation to a vessel's navigation and commerce. Atlantic Transport Co. v. Imbrovek, 234 U.S. 52, 61 (1914) ("The libellant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain no doubt that the service in loading and stowing a ship's cargo is of this character.") Ordinarily the question of whether a person was engaged in "maritime employment" is to be determined

as of "the time of the accident." Parker v. Motor Boat Sales, 314 U.S. 244, 247 (1941). *See* Pennsylvania R.R. v. O'Rourke, 344 U.S. 334, 340 (1953). But while the cases establish that loading and unloading a vessel is maritime employment, they all limited recovery to injuries sustained on the seaward side of the water's edge because such was the limit of admiralty jurisdiction. See discussion and collection of authorities in Victory Carriers, Inc. v. Law, 404 U.S. 202, 204-07 (1971). Thus, the cases shed no real light on how far shoreward the maritime nature of loading and unloading extends, particularly where, as here, the shore-based aspects of the overall loading and unloading operations have been split into numerous functions and assigned to different employees.

"Longshoreman" and "longshoring operations" are words of no greater exactness of meaning. It is true that in Intercontinental Container Transport Corp. v. New York Shipping Ass'n, 426 F.2d 884 (2 Cir. 1970), it was said that "[h]istorically the work of longshoremen included the preparation of cargo for shipment by making up, for example, drafts and pallets and, in connection with unloading cargo, the breaking up of drafts and pallets, sorting the cargo according to its consignees and delivering it to the trucks or other carriers." *Id.* at 886. At the same time, however, the opinion recognized that "[t]he work of stevedores is the loading and unloading of ships." *Id.* at 889. The case dealt with a freight forwarder's complaint that an agreement between a longshoremen's union and a steamship carriers' association, which foreclosed the forwarder's employees from stuffing and stripping containers, constituted a restraint of trade. The decision is hardly determinative of just what functions a longshoreman performs and at what point in the unloading and loading processes, if any, he ceases to perform longshoring operations.

Perhaps more significant is the fact that the Secretary of Labor, in promulgating regulations to foster safe conditions in the longshoring industry, defined "longshoring operations" as to "loading, unloading, moving, or handling of, cargo, ship's stores, gear, etc., *into, in, on, or out of any vessel* on the navigable waters of the United States." 29 C.F.R. § 1918.3(i)(1974) (emphasis added). *See* 29 C.F.R. § 1910.16(b)(1)(1974). Of course these regulations were adopted prior to enactment of the 1972 Amendments and it may well be, as the government argues, that they will ultimately be redrafted when the scope of the 1972 Amendments has been judicially determined. They are significant evidence, however, of the meaning attached to the words at the time that Congress was considering the 1972 Amendments.

Because we conclude that the terms "maritime employment," "longshoreman" and "longshoring operations" are not such words of art that we would be justified in deciding the case without resort to the legislative history of the 1972 Amendments and full consideration of the context in which they were enacted, we turn to these secondary sources. *See* United States v. Oregon, 366 U.S. 643, 648 (1961).

IV.

The Act was initially adopted in 1927 as a congressional response to a series of holdings that the states were without power to afford a workmen's compensation remedy to workers aboard vessels, and that Congress lacked the authority to validate the application of state remedies to such workers, Southern Pac. Co. v. Jensen, 244 U.S. 205 (1917); Knickerbocker Ice Co. v. Stewart, 253 U.S. 149 (1920); Washington v. W. C. Dawson & Co., 264 U.S. 219 (1924). The rationale of those cases was that under the Constitution

only Congress had authority over longshoremen injured on the seaward side of the pier. Congress responded to the broad suggestion in *Dawson,* 264 U.S. at 227, that Congress enact "general provisions for compensating injured [maritime] employees . . ." by enacting the 1927 Act.[2]

Continuing problems in the application of the Act arose from the fact that it limited recovery to injuries occurring on navigable waters, *i.e.,* it looked to the situs of the injury rather than to the maritime status of the injured longshoreman. *See* Nacirema Operating Co. v. Johnson, 396 U.S. 212, 215-16 (1969). Specifically, *Nacirema* held that the Extension of Admiralty Jurisdiction Act, which extended admiralty jurisdiction to certain land structures, did not operate to modify the basic requirement of the Compensation Act that benefits be afforded solely on account of death or injuries not reachable by state workmen's compensation

[2] It was not until the decision in Calbeck v. Travelers Ins. Co., 370 U.S. 114 (1962), that the availability of the Act's remedies for all injuries to employees on navigable waters was firmly established. Pre-1927 cases had tried to afford some protection to injured maritime employees by whittling down the *Jensen* doctrine with the so-called "maritime but local" exception, which allowed the application of state law to admittedly maritime accidents in areas of "local concern." *See, e.g.,* Grand Smith-Porter Ship Co. v. Rhode, 257 U.S. 469 (1922); Western Fuel Co. v. Garcia, 257 U.S. 233 (1921). After the passage of the 1927 Act, it was unclear whether these decisions persisted as a limit on the *federal* law's scope. *Calbeck* made it plain that they did not. What did survive was a sphere of concurrent state and federal jurisdiction, the so-called "twilight zone." This was the area where it was impossible to predict, before litigation, whether the employee's activities were so local that a state workmen's compensation act might apply. *See, e.g.,* Hahn v. Ross Island Sand & Gravel Co., 358 U.S. 272 (1959); Davis v. Department of Labor and Industries, 317 U.S. 249 (1942).

For a description of the genesis of the Act and the principal judicial constructions of it, see dissenting opinion of Haynsworth, C.J., in Marine Stevedoring Corp. v. Oosting, 398 F.2d 900, 910-11 (4 Cir. 1968), rev'd sub nom. Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969).

statutes, *i.e.*, those beyond the pier on the seaward side. Such a holding necessarily resulted in anomalies, *e.g.*, benefits were denied three longshoremen in *Nacirema* who were injured or killed when cargo hoisted by the ship's crane swung back and knocked them to the pier or crushed them against the side of a railroad car, while the widow of a fourth longshoreman whose decedent had a similar accident but was knocked into the water and drowned was able to recover. (Her case was not taken to the Supreme Court.) *See* Marine Stevedoring Corporation v. Oosting, 398 F.2d 900 (4 Cir. 1968). See also the dissenting opinion of Chief Judge Haynsworth in *Oosting* commenting on incongruities in application of the Act, 398 F.2d at 911, and our opinion in Snydor v. Villain & Fassio et Compania Int. DiGenova, 459 F.2d 365 (4 Cir. 1972), setting forth a number of ship-related but uncompensable injuries. Indeed, the Court in *Nacirema* apparently anticipated incongruous results stemming from its holding because it said:

> There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. . . . [C]onstruing the Longshormen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the Jensen line, the same confusion that previously existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in Jensen separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court. 396 U.S. at 223-24.

See also Victory Carriers v. Law, 404 U.S. 202, 216 (1971).

To the extent pertinent here, the 1972 Amendments were a direct response to the invitation in *Nacirema*. Given that Congress has the power to extend admiralty jurisdiction to the landward side of the *Jensen* line, we think that the most informative source on how far the line was extended is contained in the virtually identical House and Senate Reports, dealing with "Extension of Coverage to Shoreside Areas." *See* S. Rep. No. 92-1125, 92 Cong., 2d Sess. (1972); H.R. Rep. No. 92-1441, 92 Cong., 2d Sess. (1972). The pertinent portions of the House Report, 3 U.S. Code Cong. and Adm. News, 4698, 4707-08 (92d Cong., 2d Sess. (1972)), are set forth in the margin.[3]

[3] The present Act, insofar as longshoremen and ship builders and repairmen are concerned, covers only injuries which occur "upon the navigable waters of the United States." Thus, coverage of the present Act stops at the water's edge; injuries occurring on land are covered by State Workmen's Compensation laws. The result is a disparity in benefits payable for death or disability for the same type of injury depending on which side of the water's edge and in which State the accident occurs.

* * *

It is apparent that if the Federal benefit structure embodied in Committee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.

The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way,

The committee's report starts with frank recognition that the Act, prior to amendment, embodied the *Jensen* rule: "coverage of the present Act stops at the water's edge . . . . The result is a disparity in benefits . . . for the same type of injury depending on which side of the water's edge and in which State the accident occurs."

The committee also recognized that the disparity was worsening, not only because of unrealistic limits on benefits and exemptions from coverage contained in state workmen's compensation law, but also because modern technology in the industry required "more of a longshoreman's work . . . [to be] performed on land than heretofore." The committee then stated its belief that "the compensation payable to a

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marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further trans-shipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e., a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

longshoreman . . . should not depend upon the fortuitous circumstance of whether the injury occurred on land or over water."

With its premise thus established, the committee made a series of significant statements. It said its intent was to provide benefits to employees *"who would otherwise be covered by this Act for part of their activity"* (emphasis added). As an example, it cited employees who unload cargo from a ship and transport it "immediately . . . to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters." Such employees were to be compensated if they were injured over navigable waters or on the adjoining land area. Conversely, employees not engaged in loading or unloading a vessel were *not* to be covered even if they were injured on land in an area used for such activity.

The report specifically stated that "employees whose responsibility is only to pick up stored cargo for further transshipment would *not* be covered" (emphasis added), nor would purely clerical employees who do not participate in the loading and unloading of cargo. However, checkers *"directly* involved in the loading and unloading functions" (emphasis added) would be eligible for benefits.

We especially note that the committee report is explicit in delineating the portion of the overall loading and unloading process during which coverage attaches to longshoremen and persons engaged in longshoring operations: the Act applies between the ship and, in the case of unloading, the *first* storage or holding area on the pier, wharf, or terminal adjoining navigable waters. Although the instance of loading a ship was not discussed, we think that the same principle controls in reverse: coverage is afforded from the *last* storage or holding area on the pier, etc., to the ship.

We perceive the landward limit of coverage to be the "point of rest" as that term is generally understood in the industry, Norfolk Marine Terminal Association Tariff, No. 1-C at 18, Item 290, Respondent's Exhibit 1, Harris v. Marine Terminals, Inc., No. 74-LHCA-108 (Aug. 15, 1974), and defined by the Federal Maritime Commission in its regulations governing terminal operators. 46 C.F.R. § 533.6(c) (1974). *See also* American President Lines, Ltd. v. Federal Maritime Bd., 317 F.2d 887, 888 (D.C. Cir. 1962); DiPaola v. International Terminal Operating Co., 311 F.S. 685, 687 (S.D. N.Y. 1970).

Applying these principles to the three cases at bar, we think that in Adkins' case the container marshaling area was the first point of rest in the unloading process, and that in Brown's and Harris' cases the marshaling area adjacent to the pier was the last point of rest in the loading process. Since Adkins was injured landward of the first point of rest[4] and Brown and Harris were injured landward of the last point of rest, we think it follows that none was afforded coverage under the Act, as amended.

It might be argued that the construction we place on the statute is inconsistent with the congressional committees' statements that the 1972 Amendments were intended to make eligible for benefits "employees who would otherwise be covered by this Act [before amendment] *for part of their activity*" (emphasis added). It may well be that there are no longshoremen engaged in moving cargo between ship

[4] We are aware that Adkins testified that in the past, and sometimes over weekends, he was employed in various capacities "loading and unloading ships" and "on a ship." We think that the record is clear, however, that Adkins was not so employed at the time that he was injured; rather his duties were confined to operating a forklift in Shed 11. As we have indicated in the text, the status of his employment is to be determined as of the time of the accident—not by what his previous duties may have been or by what his duties are when he accepts sporadic overtime assignments.

and point of rest who never cross the water's edge. Such workers would not have been covered by the old Act, but will be eligible for benefits under our interpretation of the Amendments.

Our answer is that we have done no more than the committees. Although the committees said that coverage was being limited to employees who would be otherwise covered "for part of their activity," the committees clearly recognized that with modern technology "more of the longshoreman's work is performed on land" and they unequivocally stated that they intended to cover employees who unload the ship and immediately transport the cargo to a storage or holding area (point of rest) on the pier, wharf or terminal, excluding coverage only to those who pick up stored cargo for further transshipment. In view of the latter statements and the liberality of construction to be afforded remedial legislation of this type, we do not feel constrained to give an overly limiting interpretation to the phrase "employees who would otherwise be covered for part of their activity."

In summary, when we examine the amendments in the context of the Act prior to amendment, the case law construing the Act and commenting on the power of Congress to legislate in this area, and the language of the committee reports, we reject the government's assertion that all persons, excluding clerical employees other than checkers, who play any part in the overall loading and unloading process are covered by the Act as amended. We think that, with respect to longshoremen or other persons engaged in longshoring operations, the Amendments extend only to those employees engaged in loading and unloading activities between the ship and the first (last) point of rest, including checkers "directly involved in [such] loading or unloading functions."

V.

In the posture in which Nos. 75-1051 and 75-1088 came to our court, the Benefits Review Board, Department of Labor, was named as respondent in a petition under § 21(c) of the Act, 33 U.S.C. § 921(c) (1975 Supp.), to review the Board's order awarding benefits. The claimant, William T. Adkins, was also named as a respondent. In due course the Board moved that it be dismissed from the proceedings and that there be substituted as a respondent the Director, Office of Workers' Compensation Programs. The claimant did not oppose the motion, but petitioners, I.T.O. Corporation of Baltimore and Liberty Mutual Insurance Company, and the intervenors, National Association of Stevedores, et al., did oppose it. We deferred decision on the motion until decision of the cases.

In agreement with the holding and reasoning of McCord v. Benefits Review Bd., 514 F.2d 198 (D.C. Cir. 1975), we do not think that the benefits Review Board is a respondent to a petition to review its order under either 33 U.S.C. § 921(c) or Rule 15(a,) F.R.A.P. The same result has been reached by the Ninth Circuit in two unreported cases. Westfall v. Benefits Review Board (Nos. 73-2578 and 73-2579, 9 Cir. Dec. 5, 1973); Walker v. Benefits Review Board (Nos. 74-1340 and 74-1494, 9 Cir. Aug. 9, 1974). As the District of Columbia Circuit held, "there is sufficient adversity between [employer and employee] to insure proper litigation without participation by the Board," 514 F.2d at 200, and on this reasoning we do not think that the Director, Office of Workers' Compensation Programs is a proper respondent either. We dismiss the Board and deny the substitution. This, of course, is not to say that either the Board or a court of appeals may not, in a proper case, permit intervention by others who have an interest at stake and that they may not

appear as petitioners or respondents as their interests appear.

Counsel for the government have performed a valuable service in these cases by supplementing the argument of the claimants as to the meaning to be afforded the 1972 Amendments. We treat their participation, however, as *amicus curiae*.

In Nos. 75-1075 and 75-1196, no point is made of who are named as respondents. We make none, confident in the belief that in this circuit future litigation will be conducted in accordance with what we have stated.

Reversed; Benefits Review Board Dismissed In Nos. 75-1051 and 75-1088

Craven, Circuit Judge, dissenting:

William T. Adkins, Donald D. Brown, and Vernie Lee Harris will, I think, be surprised to learn that they are not longshoremen, and astonished to discover that they are not engaged in maritime employment of any kind. If they are not, as my brothers hold, then the Congress has labored prodigiously only to have accomplished nothing at all in its effort to simplify the problems of maritime workers' compensation. While these cases are the first to reach a court of appeals under the 1972 amendments to the Act,[1] they will surely not be the last. Henceforth, injured employees

[1] *See generally* 1A *Benedict on Admiralty* §§ 15-30 (7th ed. 1973, Supp. October 1975); Gorman, *The Longshoremen's and Harbor Workers' Compensation Act—After the 1972 Amendments,* 6 J. Maritime L. & Commerce 1 (1974); Gorman. *The Longshoremen's Act After the 1972 Amendments,* 20 Practical Lawyer 13 (1974); Comment, *Broadened Coverage Under the LHWCA,* 33 La. L. Rev. 683 (1973); Comment, *The Longshoremen's and Harbor Worker's Compensation Act Amendments of 1972: An End to Circular Liability and Seaworthiness in Return for Modern Benefits,* 27 U. Miami L. Rev. 94

and their counsel must comb the waterfronts of this circuit, probing hopelessly, like Diogenes with his lantern, for that elusive "point of rest" upon which coverage depends. I decline to make that search, and would hold that these plaintiffs and others like them are covered by the Act as amended.

I.

In general I agree with Part II of the majority opinion. The gist of the amended Act is that for a person to be eligible for compensation he must have been injured on the "navigable waters" of the United States (as redefined by the Act) and that at the time of his injury he must have been an "employee."

I agree with my brothers that Adkins, Brown, and Harris were injured while upon the "navigable waters" of the United States as that term has been expanded by the 1972 amendments.

Since plaintiffs satisfy the "situs" test, the only remaining inquiry is whether or not they had the proper "status," *i.e.*, were they "employees" within the meaning of § 902(3) of the amended Act. If they were, then both requirements for coverage are met, and they are entitled to recover.

II.

To be "employees" within the meaning of the Act, plaintiffs must fall within § 902(3), which provides:

(1972); Note, *Maritime Jurisdiction and Longshoremen's Remedies,* 1973 Wash. U.L.Q. 649 (1973); Note, *Admiralty—the 1972 Amendments to § 903 of the Longshoremen's and Harbor Workers' Act: Has the "Twilight Zone" Moved Onto the Pier?,* 4 Rutgers-Camden L.J. 404 (1973); Note, *Admiralty—Maritime Personal Injury and Death—Longshoremen's and Harbor Workers' Act Amendments of 1972,* 47 Tulane L. Rev. 1151 (1973).

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, ...

The critical term is "maritime employment."[2] That term is used by the Congress generically—a broad term that is said to include the narrower terms: "longshoreman," "longshoring operations," and "harborworker." The latter are lesser included examples of "maritime employment." Thus the terms "maritime employment" and "longshoring" cannot be synonyms. The Act on its face clearly suggests that there are jobs which may not constitute longshoring operations but which are "maritime employment."[3]

[2] On the basis that there can be nothing more maritime than the sea, every employment on the sea or other *navigable waters* should be considered as maritime employment. . . . it would be well to adopt a criterion which takes into account the undoubted jurisdiction of admiralty in matters of all injuries on *navigable waters.*

1A *Benedict on Admiralty, supra,* note 1 at § 17 (emphasis added). In this context, note the greatly expanded definition of "navigable waters" contained in the 1972 amendments as set forth on page 8 of the majority opinion.

[3] There is, apparently, some confusion about this. Appellants consistently take the position that an employee can be covered only if he engages in traditional *longshoring* operations. (". . . Congress in extending the coverage of the Act shoreward was concerned only with those workers commonly known as longshoremen . . . . Clearly Congress did not intend that the Act as amended would apply to workers who during the course of their duties are not required to go on board ship . . . ." Brief for Petitioners Maritime Terminals, Inc. and Aetna Casualty and Surety Co. at 19). *See, e.g.,* Vickery, *Some Impacts of the 1972 Amendments to the Longshoremen's and Harbor Workers' Compensation Act,* XLI Ins. Counsel J. 63, 67 (1974) ("The employee must be engaged in 'longshoring operations' . . . ."). While for purposes of this appeal I do not find it necessary to go beyond

Because of their professed inability to discern the meaning of "maritime employment" and "longshoring operations," the majority feels driven to legislative history.[4] With all deference, I think they give up too easily. The Congress is entitled to have its words accorded meaning if it is at all possible to do so, and I think it is. There are guidelines and aids for statutory construction and interpretation which, it seems to me, the majority overlooks in its rush to the committee reports.

A. In the first place, the 1972 amendments to the Act are of a remedial nature, designed to correct inequities

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the question of whether these three plaintiffs were engaged as longshoremen, I do point out that to equate maritime employment with longshoring operations denies meaning to the broader term chosen by the Congress.

Indeed, it seems correct to hold that even the term "harborworker" is broader and more generic than "longshoremen," and that longshoremen are but a category of harborworkers.

> First in the catalogue of harbor workers is the longshoreman. The longshoreman, as the name implies, is a shoreside worker whose principle activity is the loading and unloading of ship's cargo.
>
> . . . .
>
> Outside of cargo work in the holds, longshoremen are engaged in various tasks in connection with voyage preparation or termination. The work may consist of carrying ship's stores or passenger's baggage aboard ship. *Or the work may be performed entirely on the pier in the handling of mechanical equipment, or the storing, moving, or loading of goods on the dock.*

M. Norris, 1 *The Law of Maritime Injuries* § 3 (3d ed. 1975). (Emphasis added.)

[4] Because we conclude that the terms "maritime employment," "longshoreman" and "longshoring operations" are not such words of art that we would be justified in deciding the case without resort to the legislative history of the 1972 Amendments and full consideration of the context in which they were enacted, we turn to these secondary sources.

Maj. Op. 14.

worked by the Act prior to its amendments. With this in mind, we should be guided by a uinform line of cases holding that the Longshoremen's and Harborworkers' Compensation Act should be liberally construed in light of its remedial nature and humanitarian purposes. *See, e.g., Reed* v. *Steamship Yaka,* 373 U.S. 410 (1963), *rehearing denied,* 375 U.S. 872 (1963); *Voris* v. *Eikel,* 346 U.S. 328 (1953); *Pillsbury* v. *United Engineering Co.,* 342 U.S. 197 (1951); *Nalco Chemical Corp.* v. *Shea,* 419 F.2d 572 (5th Cir. 1969); *Calbeck* v. *A. D. Suderman Stevedoring Co.,* 290 F.2d 308 (5th Cir. 1961); *Old Dominion Stevedoring Corp.* v. *O'Hearne,* 218 F.2d 651 (4th Cir. 1955); *Blackwell Construction Co.* v. *Garrell,* 352 F.Supp. 192 (D.D.C. 1972); *Page Communications Engineers, Inc.* v. *Arrien,* 315 F.Supp. 569 (E.D. Pa. 1970); *Holland American Insurance Co.* v. *Rogers,* 313 F.Supp. 314 (N.D. Cal. 1970); *Gibson* v. *Hughes,* 192 F.Supp. 571 (S.D.N.Y. 1961). In addition, case law precedent admonishes us to construe doubts, including factual disputes such as are before us in these cases, in favor of the employee or his family. *Friend* v. *Britton,* 220 F.d 820 (D.C. Cir. 1955), *cert. denied,* 350 U.S. 836 (1955); *Hartford Accident & Indemnity Co.* v. *Cardillo,* 112 F.2d 11 (D.C. Cir. 1940), *cert. denied,* 310 U.S. 649 (1940); *Grain Handling Co.* v. *McManigal,* 23 F.Supp. 748 (W.D.N.Y. 1938), *aff'd* 102 F.2d 464, *cert. denied,* 308 U.S. 570 (1939). Finally, "a narrowly technical and impractical construction" of this chapter is not favored. *Luckenbach S.S. Co.* v. *Norton,* 106 F.2d 137, 138 (3d Cir. 1939). Inasmuch as the 1972 amendments were enacted to further the purposes of the original Act, these decisions are still authoritative indications of the proper approach to interpretation of the statute.

B. My brothers failed to give sufficient weight, if any, to a

presumption created by § 20 of the LHWCA, 33 U.S.C. § 920:

> § 920. *Presumptions*
>
> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary—
>
> (a) That the claim comes within the provisions of this chapter.

Clearly, the statute switches the ordinary burden of proof. I am unable to agree that defendants have sustained *their* burden by showing by substantial evidence that plaintiffs were *not* engaged in "maritime employment." At most, defendants have offered some evidence as to the nature of plaintiffs' employment. That it may be enough to create a doubt will not defeat the presumption. Doubts are to be resolved in favor of the employee. *Friend* v. *Britton, Bordilla, Grain Handling, supra; Beasley* v. *O'Hearne,* 250 F.Supp. 49 (S.D.W.Va. 1966).

C. Aside from canons of construction and the special statutory presumption, there is another honored approach enabling a court to accord specific meaning to the words of a statute: "A consistent and contemporaneous construction of a statute by the agency charged with its enforcement is entitled to great deference by the courts." *NLRB* v. *Boeing,* 412 U.S. 67, 75 (1973). This familiar rubric of statutory construction has often found expression in the decisions of this court. *E.g., Brennan* v. *Prince William Hospital,* 503 F.2d 282 (4th Cir. 1974) (Secretary of Labor's interpretation of statute entitled to "great deference"); *Tenneco, Inc.* v. *Public Service Commission,* 489 F.2d 334 (4th Cir. 1973) ("This administrative interpretation, while not controlling,

is entitled to great weight"); *Nacirema Operating Co.* v. *Oosting,* 456 F.2d 956 (4th Cir. 1972) ("we cannot lightly put aside the Agency's consistent interpretation of the [LHWCA]").

Section 939 of the Act entrusts the overall administration of the statute to the Secretary of Labor, and gives him the authority to "make such rules and regulations . . . as may be necessary . . . ." Amended § 921 provides for a new method of review of compensation orders whereby disputes as to coverage are first determined by an administrative law judge with right of appeal to the Benefits Review Board. The three Board members are appointed by the Secretary, and their decisions are reviewable by the court of appeals for the circuit where the injury occurred. 33 U.S.C. §§ 921 (b) & (c).

I have examined some 32 decisions of the Board rendered from its inception through October 1975 involving the shoreward extension of coverage under the 1972 amendments.[5]

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[5] Dellaventura v. Pittston Stevedoring Corp., 2 BRBS 340 (Oct. 9, 1975); Lopez v. Atlantic Container Lines, Ltd., 2 BRBS 265 (Sept. 9, 1975); Shoemaker v. Schiavone & Sons, Inc., 2 BRBS 257 (Sept. 5, 1975); Batista v. Atlantic Container Lines, Ltd., 2 BRBS 193 (Aug. 22, 1975); Spataro v. Pittston Stevedoring Corp., 2 BRBS 122 (Aug. 8, 1975); Stockman v. John T. Clark & Son of Boston, 2 BRBS 99 (July 30, 1975), *appeal docketed,* No. 75-1360 (1st Cir., filed Sept. 24, 1975); Johns v. Sea-Land Service, Inc., 2 BRBS 65 (July 11, 1975), *appeal docketed,* No. 75-2039 (3d Cir., filed Sept. 9, 1975); Mildenberger v. Cargill, Inc., 2 BRBS 51 (July 3, 1975); Watson v. John T. Clark & Son of Boston, Inc., 2 BRBS 47 (July 3, 1975); Richardson v. Great Lakes Storage and Contracting Co., 2 BRBS 31 (June 26, 1975), *appeal docketed,* No. 75-1786 (7th Cir., filed Aug. 25, 1975); Skipper v. Jacksonville Shipyards, Inc., 1 BRBS 533 (June 11, 1975), *appeal docketed,* No. 75-2833 (5th Cir., filed July 11, 1975); Cappelluti v. Sea-Land Service, Inc., 1 BRBS 527 (June 10, 1975), *appeal docketed,* No. 75-1801 (3d Cir., filed July 23, 1975); Vinciquerra v. Transocean Gateway Corp., 1 BRBS 523 (June 5, 1975); Powell v. Cargill, Inc., 1 BRBS 503 (May 30, 1975), *appeal docketed,* No. 75-2655 (9th Cir., filed July 28, 1975); O'Leary v. Southeast Stevedore Co., 1 BRBS 498 (May 30, 1975); Nulty v.

I think these decisions of the Board have established a consistent and reasonable interpretation of the Act which should be accorded "great weight" in this court. The Board is a quasi-judicial body within the agency charged with administration of the Act, and its function is to resolve disputes concerning coverage under the 1972 amendments. Not simply in these three cases, but time and again in an unbroken line of decisions, the Board has found that coverage exists in factually similar cases.

Repeatedly and consistently the Board has emphasized:

1. Outright rejection of the "point of rest" theory as a determinative factor in cases where coverage is disputed.

Halter Marine Fabricators, Inc., 1 BRBS 437 (May 2, 1975), *appeal docketed,* No. 75-2317 (5th Cir., filed May 20, 1975); Scalmato v. Northeast Marine Terminals, Co., 1 BRBS 461 (May 7, 1975); Mininni v. Pittston Stevedoring Corp., 1 BRBS 428 (May 1, 1975); DiSomma v. John W. McGrath Corp., 1 BRBS 433 (April 30, 1975); Ford v. P. C. Pfeiffer Co., Inc., 1 BRBS 367 (March 21, 1975), *appeal docketed,* No. 75-2289 (5th Cir., briefs filed Oct. 2, 1975); Mason v. Old Dominion Stevedoring Corp., 1 BRBS 357 (March 21, 1975); Ronan v. Maret School, Inc., 1 BRBS 348 (March 10, 1975), *appeal docketed,* No. 75-1445 (D.C. Cir., filed May 5, 1975); Kelley v. Handcor, Inc., 1 BRBS 319 (Feb. 28, 1975), *appeal docketed,* No. 75-1943 (9th Cir., filed April 28, 1975); Harris v. Maritime Terminals, Inc., 1 BRBS 301 (Feb. 3, 1975), *appeal docketed,* No. 75-1196 (4th Cir., oral argument Aug. 21, 1975); Perdue v. Jacksonville Shipyards, Inc., 1 BRBS 297 (Jan. 31, 1975), *appeal docketed,* No. 75-1659 (5th Cir., briefs filed June 4, 1975); Herron v. Brady-Hamilton Stevedoring Co., 1 BRBS 273 (Jan. 23, 1974), *appeal docketed,* No. 75-1538 (9th Cir., filed March 7, 1975); Ryan v. McKie Co., 1 BRBS 221 (Dec. 10, 1974); Brown v. Maritime Terminals, Inc., 1 BRBS 212 (Dec. 6, 1974), *appeal docketed,* No. 75-1075 (4th Cir., oral argument Aug. 21, 1975); Coppolino v. International Terminal Operating Co., Inc., 1 BRBS 205 (Dec. 2, 1974); Adkins v. I.T.O. Corporation of Baltimore, 1 BRBS 199 (Nov. 29, 1974), *appeal docketed,* No. 75-1051 and No. 75-1088 (4th Cir., oral argument Aug. 21, 1975); Gilmore v. Weyerhaeuser Co., 1 BRBS 180 (Nov. 12, 1974), *appeal docketed,* No. 74-3384 (9th Cir., oral argument Oct. 17, 1975); Avvento v. Hellenic Lines, Ltd., 1 BRBS 174 (Nov. 12, 1974).

2. Waterborne cargo remains in maritime commerce until such time as it is delivered to a trucker or other carrier to be taken from the terminal for further transshipment.

3. Cargo first enters maritime commerce when it is unloaded from a truck or other carrier and is handled by terminal employees working upon the "navigable waters" of the United States as defined in the Act.

4. The "loading and unloading" of ships is a continuous process involving many different employees working at various places within the terminal area and performing different tasks, but includes the handling of cargo during all times it is in maritime commerce.

5. It is sufficient to bring an employee within the scope of maritime employment that his duties at the time of injury involve handling cargo that is in maritime commerce.

6. The Act does not require that one actually be engaged in loading or unloading vessels to be an "employee" within the meaning of the Act.

I think we should hesitate to reject out of hand the expertise of the Board, and should instead accord its consistent interpretations of the statute "great deference."[6]

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[6] It has become clear that the position taken by the Board with respect to the scope of coverage under the amended Act reflects at least the initial position of the Secretary of Labor.

At 20 C.F.R. Part 710, the Department of Labor issued proposed guidelines for coverage under the LHWCA as amended. Section 710.4(b) states:

> Based on procedures normally utilized in the maritime industry, the loading process may include certain terminal activities which are incidental to the placement of cargo on the vessel. Conversely, the unloading process may also include certain terminal activities.

D. Before the 1972 amendments, § 921(b) of the LHWCA provided that review of compensation orders be had in the federal district courts. Although the scope of review was not defined by statute, the cases soon made clear that the district courts' inquiry was "strictly limited." *Mid-Gulf Stevedores, Inc.* v. *Neuman,* 333 F.Supp. 430, 431 (E.D.La. 1971), *reversed on other grounds,* 462 F.2d 185 (1972). *See also O'Keeffe* v. *Smith, Hinchman and Grylls Associates, Inc.,* 380 U.S. 359 (1965). Rulings by the district court could, of course, be appealed to the circuit court of appeals, but the scope of review there was also very narrow. *O'Loughlin* v. *Parker,* 163 F.2d 1011 (4th Cir. 1947) ("... it is ... undisputed that the compensation order below must be accepted by us if it has warrant in the record and a reasonable basis in law.").

The Benefits Review Board now performs essentially the same function as did the district courts prior to the Act's amendment. One significant difference, however, is that the scope of the Board's review is expressly defined by statute: "The findings of fact in the decision under review by the Board shall be conclusive if supported by substantial evidence in the record considered as a whole." 33 U.S.C. § 921(b)(3). Section 921(c) provides that appeals from

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> Terminal activities to be included in coverage under the amended Act are employees engaged in loading or unloading break-bulk, containerized or Lash ships and lighters, or passenger ships. Activities which may be covered include employees engaged in *stuffing and stripping of containers,* employees working in and about marine railways, and *other employees engaged in processing water-borne cargo.*

(Emphasis added.)

These proposed guidelines are now under study by the Department, and thus do not as yet represent the official view of the Department of Labor. Yet they are useful in ascertaining the Department's initial interpretation of the statute in light of the consistent position taken by the Benefits Review Board.

the Board may be taken to the court of appeals for the circuit where the injury occurred. Significantly, the scope of review in the circuit courts is not defined, limited, or expanded by the 1972 amendments. I should think, therefore, that the same *narrow* review exercised by this court prior to 1972 remains the proper standard of review on appeal today. *Cardillo* v. *Liberty Mut. Ins. Co.,* 330 U.S. 469 (1947); *Wheatley* v. *Adler,* 407 F.2d 307 (D.C. Cir. 1968); *Wolff* v. *Britton,* 328 F.2d 181 (D.C. Cir. 1964); *O'Loughlin* v. *Parker, supra; Groom* v. *Cardillo,* 119 F.2d 697 (D.C. Cir. 1941).

My point is that the majority has failed to heed the restricted scope of review which the cases require of us. In all three cases here on appeal, the administrative law judge found coverage under the Act. In each case the Benefits Review Board, bound by its "substantial evidence" standard, affirmed. The majority opinion reverses, and this, I submit, is error. The record as a whole leaves no doubt in my mind that the decisions of the administrative law judge and the Benefits Review Board have "warrant in the record and a reasonable basis in law." *O'Loughlin* v. *Parker, supra.* I would, on this basis alone, vote to affirm.

III.

The basic disagreement between myself and my brothers is whether or not resort to the legislative history was necessary at all in these cases. My brothers feel that the language of the 1972 amendments is ambiguous, and they accordingly embark upon their search for congressional purpose and intent citing as authority *United States* v. *Oregon,* 366 U.S. 643, 648 (1961). I find no such ambiguity and note that the operative sentence in the *Oregon* case cited by my brethren reads as follows: "Having concluded that the pro-

visions of [the statute] are clear and unequivocal on their face, we find no need to resort to the legislative history of the Act." 366 U.S. at 648. In taking such a position, I find reassurance in case law precedent in this circuit. *United States* v. *Deluxe Cleaners & Laundry, Inc.*, 511 F.2d 926 (4th Cir. 1975) (not permissible for court to assume that Congress by inadvertence failed to state something other than what is plainly set forth in statute); *United States* v. *Snider*, 502 F.2d 645 (4th Cir. 1974) ("Congress is presumed to have used words according to their ordinary meaning, unless a different signification is clearly indicated."); *United States* v. *Erdos*, 474 F.2d 157 (4th Cir. 1973) ("When the power of Congress is clear, and the language of exercise is broad, we perceive no duty to construe a statute narrowly."); *United States* v. *Hunter*, 459 F.2d 205 (4th Cir. 1972) ("Legislative intent is first to be gathered from the plain meaning of the words of the statute."); *Vroon* v. *Templin*, 278 F.2d 345 (4th Cir. 1960) ("The language of the statute is plain and is to be taken as written."); *Aiken Mills, Inc.* v. *United States*, 144 F.2d 23 (4th Cir. 1944) (". . . when the language of the statute is clear and needs no intetrpretation we may not look to the legislative history . . . ."). *Missel* v. *Overnight Motor Transp. Co.*, 126 F.2d 98 (4th Cir. 1942) ("Normally the best evidence of congressional purpose is the language of the law itself."); *Inland Waterways Corp.* v. *Atlantic Coastline R. Co.*, 112 F.2d 753 (4th Cir. 1940) ("Other parts of the same Act, or the debates in Congress, during the passage of the statute, can throw no light on that which is already made plain by the words used in the statute itself.").

It is the term "maritime employment" which troubles the majority. For reasons discussed *infra*, I do not find the term ambiguous, but would instead hold that it has an estab-

lished meaning sufficiently broad and inclusive to cover these three plaintiffs.

* * *

In summary, I would first hold that resort to the legislative history is unnecessary and would affirm on the basis of the plain language of the statute. Secondly, even if it is assumed *arguendo* that the statute is ambiguous, there are: (A) an established rule of statutory construction, (B) a statutory presumption, (C) administrative interpretations of the Act, and (D) a narrow and restricted scope of review in this court, all of which should control our disposition of this case and which, in my view, require affirmance. The majority fails to consider these factors, and in doing so commits error.

IV.

In all candor, I must confess that my objections to the majority's resort to legislative history might have been somewhat mollified had the prize been worth the hunt. Despite close examination of the background of the LHWCA and the 1972 amendments in Part IV of the majority opinion, however, my brothers are unable to produce any statement of congressional intent which conclusively resolves the matters here in issue. Indeed, contrasted to the straight-forward language of amended § 902(3), the phrasing of the House Report relied upon by the majority is to me virtually useless as a guide to who is covered and who is not.[7]

The sentence in the House Report thought crucial by the majority reads as follows: "Thus, employees whose

[7] *See* footnote 3 of the majority opinion, *supra*.

responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo." I think they read more into the sentence than is there. In the first place, over-the-road and local truck drivers who come to a terminal to pick up cargo for further transshipment would certainly not be covered for several reasons: (a) ordinarily they are at the outer perimeter of the terminal and not on "navigable water,"[8] (b) usually truck drivers, certainly if unionized, never load their trucks; they only *drive* them. The sentence from the House Report is inartful, and seems to mean that neither clerical workers nor truck drivers picking up shipments are covered and for the same reason: neither category of workers have anything to do with the loading or unloading of cargo. The wording in the House Report just quoted cannot be so broadly construed so as to exclude from coverage those workers who (1) work on the "navigable waters" and (2) must directly handle cargo in the *overall* process of loading and unloading ships.

I think it is clear that the legislative history standing alone cannot support the majority position. At best, the House Report matches its own ambiguity against that of the statute. The majority opinion makes sense only when the legislative history is paired with the "point of rest" theory, a concept which appears *nowhere* in the legislative history *or* the statute, and one which I predict, will confound and perplex this court for years to come.

According to the majority, waterborne cargo leaves the chain of maritime commerce when it is taken off the ship and lowered to its "point of rest." Likewise, cargo enters

[8] Section 903(a), reproduced at page 8 of the majority opinion, *supra*.

maritime commerce when it is picked up from its "point of rest" and loaded onto the ship. Waterfront employees who handle cargo on the landward side of this point would thus not be covered by the Act, for their service would not be "maritime employment." On the other hand, as this same cargo passes through the "point of rest" seaward, it somehow undergoes a qualitative metamorphosis, acquiring maritime characteristics; employees who handle the cargo on that side of the point are engaged in "maritime employment" and are covered by the Act. Thus, the location of the "point of rest" is crucial.

The majority relies upon two pre-amendment definitions urged upon the court by appellants in their briefs. The Norfolk Marine Terminal Association Tariff (Item 290) defines the term thus:

> The term "point of rest" means a point within a Terminal where the terminal operator designates that cargo or equipment be placed for movement to or from a vessel.

Federal Maritime Commission Regulations, 46 C.F.R. § 533.6(c), refer to the point as follows:

> "[P]oint of rest" shall be defined as that area on the Terminal facility which is assigned for the receipt of inbound cargo from the ship and from which inbound cargo may be delivered to the consignee, and that area which is assigned from the receipt of outbound cargo from shippers for vessel loading.

In addition, the FMC has noted:

> The handling of cargo by a Terminal operator is (t)he service of physically moving cargo between the point of

rest and any place on the Terminal facility other than the end of the ship's tackle. 46 C.F.R. Section 533.6 (d)(6).

Where in the Act or its legislative history is there any suggestion that the Congress meant for us to "read into" the statute the proposition that "maritime employment" exists only on the seaward side of this "point of rest" as defined in these pre-amendment regulations? If Congress, as appellants claim, meant to embrace the concept of the "point of rest" as a demarcation line between "maritime" and "non-maritime" employment, why was this "generally understood" doctrine not explicitly written into § 902(3) of the Act, defining "employee," or at the very least, mentioned in the legislative reports? Surely a concept of such alleged widespread use and application is too conspicuous by its absence to be read into the statute. This court has no license to find in a statute words which the Congress did not put there.

"Statutory explication may be an art, but it must not be artful." *United States* v. *Parker,* 376 F.2d 402 (5th Cir. 1967). "[O]ne sentence in a Senate Report is not controlling where both houses of Congress have passed a bill containing unambiguous language to the contrary." *Abell* v. *Spencer,* 225 F.2d 568 (D.C. Cir. 1955). "[W]e know of no authority for the substitution of the language of a Committee Report for that of the statute to which it relates." *Wodehouse* v. *Commissioner,* 166 F.2d 986 (4th Cir. 1948).

A survey of legal commentary on the 1972 amendments[9] reveals only one instance where the point of rest theory was

[9] *See* authorities cited in footnote 1, *supra.*

discussed,[10] although shoreside extension of coverage was an issue considered by every writer.

That the "point of rest" theory attracts so little support from legal scholars suggests to me their awareness that its application would destroy congressional purpose and emasculate the administration of the Act. Counsel for appellants have conceded, both in their briefs and in oral argument, that the location of the "point of rest" will vary from port to port, depending upon the sophistication of each port's cargo-handling facilities. The definitions relied upon by the majority, moreover, would grant to the terminal operator power to shift unilaterally the "point of rest" seaward or shoreward at his whim or caprice.

If the "point of rest" theory remains wedged between the lines of the LHWCA, the result can only be to erect yet another "situs" requirement for coverage. Once the initial "situs" test is satisfied, *i.e.,* it is determined that a worker is injured on "navigable waters" as defined by the Act, the only remaining inquiry should be whether his employment is "maritime." A worker's "status," *i.e.,* whether he is engaged in maritime employment, should be determined by the *nature* of his work, and not *where* he performs it. Yet, the "point of rest" theory, adopted by the majority, means that workers performing the *same* function, handling the *same* cargo, will be treated differently depending upon *where* they work, even though they are all working on the premises of a terminal conceded to be within the Act's definition of "navigable waters." It was precisely this anom-

[10] *Vickery, supra* note 4 at 68. In the introductory paragraph to Mr. Vickery's article it is stated that he worked "extensively" with the Congress as a representative of several maritime and steamship associations in drafting the 1972 amendments. Yet I note again that the "point of rest" theory which, he insists, is a part of the statue is nowhere to be found in the Act nor is it mentioned in the legislative history.

aly, where workers exposed to identical risks receive disparate workmen's compensation benefits, which provided the impetus for the 1972 amendments.[11] Thus, the majority effectively holds that the Congress has failed in its effort to correct a bad situation, and that coverage even yet depends upon a fictional location—point of rest—that has no relation whatever to the inherent risks of employment.

All three plaintiffs in these appeals were required to handle ship's cargo while on the navigable waters of the United States. The risks incident to such hazardous employment resulted in unfortunate injury to all three. I believe the LHWCA covers each one, and that Congress intended just such a result.

V.

I am convinced that Adkins, Brown and Harris are "employees" covered by the Act, whether the nature of their employment is termed "maritime," "longshoring," "harborworker," or "loading and unloading." It is clear, however, that "maritime employment" is the broadest of the terms, while "loading and unloading" is the narrowest and the most indisputably "maritime." Accordingly, while I prefer not to quibble over labels, I feel it important to demonstrate that there is ample case law precedent for the proposition that all three plaintiffs were engaged in "loading and unloading"[12] ships, an occupation which is inherent in the

[11] Nacirema Operating Co. v. Johnson, 396 U.S. 212 (1969); Note 1973 Wash. U.L.Q., *supra* note 1 at 666.

[12] *See, e.g.,* Gorman, 20 Practical Lawyer, *supra* note 1 at 18. (". . . the test for coverage is whether the employee is 'directly involved' in loading, unloading, repairing or building a vessel. There is bound to be litigation that will outline in a case-by-case basis the tests to determine coverage of employees injured in adjoining areas."); Note, 1973 Wash. U.L.Q., *supra* note 1 at 670; Note 4, Rutgers-Camden L.J., *supra* note 1 at 410-412.

work of longshoremen, who, in turn, are defined by the Act to be in "maritime employment" and thus are covered "employees."

Most of the cases[13] describing the "loading and unloading" of ships involve attempts by longshoremen to assert a cause of action in admiralty against a shipowner for injuries sustained in ship's service.

In *Litwinowicz* v. *Weyerhaeuser S.S. Co.,* 179 F.Supp. 812 (W.D. Pa. 1959), a plaintiff was injured as steel beams were being loaded into a vessel. Plaintiff's job was to prepare the beams for unloading from a railroad car on the pier so that they could be then loaded into the ship. This work was performed on land and *inside* the railroad car. In holding for the plaintiff, the court remarked:

> The term loading is not a word of art, and is not to be narrowly and hypertechnically interpreted. Plaintiff's actions at the time of the accident were direct, necessary steps in the transfer of the steel from the railroad car into the vessel which constituted the work of loading.

179 F.Supp. at 817-18. The court expressly rejected the defense contention that plaintiff was merely preparing the cargo for loading, and was therefore not actually engaged in loading the ship.

In *Hagans* v. *Ellerman & Bucknall S.S. Co.,* 318 F.2d 563 (3d Cir. 1963), bags of sand were unloaded from a ship in canvas slings. The bags were placed upon a four-wheeled flatbed truck; then a tow motor vehicle was hooked to the

[13] Although the Act has been amended, prior cases defining the scope of "maritime employment" and "loading and unloading" are still useful in determining who is covered under the 1972 amendments and who is not. 1A Benedict, *supra* note 1 at § 18.

truck and pulled it into a large warehouse building some distance from the ship's berth. After the truck arrived inside the warehouse, plaintiff's job was to lift off bags of sand and stack them five-high on the floor of the warehouse. Plaintiff slipped on loose sand on the warehouse floor and was injured. The defense claimed that plaintiff was merely stacking bags for purposes of transshipment, an argument which has a familiar ring in the context of the cases here on appeal. The court, in rejecting this argument, held:

> He was unloading bags of sand from the motor-towed trucks and placing them in the first immobile resting place ashore. They were the same bags handled by his fellow longshoremen who had started the process of discharge of the cargo in the hold of the vessel. The pier apron could not contain the large number of bags which, in any event, had to be protected from the weather, by being placed within the pier building. The conclusion is inescapable that Hagans performed an integral part of the unloading of the vessel and thus as a matter of law he was in ship's service.[14]

318 F.2d at 571.

In *Thompson* v. *Calmar S.S. Corp.*, 331 F.2d 657 (3d Cir. 1964), the problem again involved loading steel from freight cars into a ship. In order to bring a particular freight car into position for unloading, it was necessary to "bump" it into position using other freight cars pulled by the ship's winch. Plaintiff was stationed at the brake of the car to be

[14] The term "first immobile resting place ashore" suggests an awareness by the court of the point of rest theory. Yet note that this was not the determinative factor considered by the court in reaching its ultimate conclusion. Rather, the court emphasized the *nature* of the plaintiff's job and stressed the fact that plaintiff was required to handle the cargo.

unloaded. The impact of the other cars striking the one upon which plaintiff was standing catapulted him across the track where his left leg was amputated by the wheels of the railroad car. The court had no difficulty finding that plaintiff was engaged in the process of loading a ship, although he was not even handling cargo at the time of his injury.

In *Spann* v. *Lauritzen,* 344 F.2d 204 (1965), nitrate powder was being unloaded from a ship by crane and dropped into a hopper on the pier. As trucks drove under the hopper, plaintiff would discharge nitrate into the waiting trucks by pulling a heavy bar or handle. A malfunction of the handle caused plaintiff's injuries. The question on appeal was whether plaintiff was *unloading* a ship or merely *loading* a truck for further transshipment. Citing *Hagans, Calamar,* and *Litwinowicz, supra,* the court held plaintiff was engaged in "unloading" a ship, and was "no less so because modern ingenuity suggested the desirability of combining the unloading of the vessel with the loading of the trucks. . . .The labor saving method here used which facilitated the removal of the cargo by motor vehicles may not be held to eliminate the unloading of the cargo from the area of traditional work of the seamen in the service of the vessel." 344 F.2d at 206.

In *Olvera* v. *Micholos,* 307 F.Supp. 9 (S.D. Texas 1968), plaintiff was using a power shovel to pick up corn from a railroad car and move it into a warehouse, from which it was then loaded into a ship's hold. The district court refused a defense motion for summary judgment on plaintiff's personal injury claims on the grourds that plaintiff could possibly prove that his work was "an essential part of the loading process." 307 F.Supp. at 11.

In *Byrd* v. *American Export Isbrandtsen Lines, Inc.,* 300 F.Supp. 1207 (E.D. Pa. 1969), plaintiff was attempting to move cargo from the back of the pier into a position on the

front of the pier for loading onto a ship. Plaintiff was injured while operating a forklift truck for this purpose. In holding that plaintiff was "essentially engaged in a loading operation," 300 F.Supp. at 1208, the court relied upon ***Litwinowicz, supra,*** and declared that "defendant unduly delimits the term 'loading' to the actual transfer of the cargo from the front of the pier to the vessel." 300 F.Supp. at 1028.

The plaintiff in *Chagois* v. *Lykes S.S. Co.,* 432 F.2d 388 (5th Cir. 1970), was standing inside a boxcar operating an auger which facilitated the even flow of rice out of the railroad car. Rice flowed from the railroad car into a shore-based hopper and was thence loaded in bulk into the hold of a waiting vessel. Plaintiff was injured operating the auger. In holding that plaintiff was engaged in loading a ship, the court held that "his work . . . was an essential part of an unbroken sequence of moving the rice from the pier to the ship." 432 F.2d at 391.

A very important case is *Law* v. *Victory Carriers, Inc.,* 432 F.2d 376 (5th Cir. 1970). Plaintiff in this case had various waterfront duties. On the day of his accident he was driving a forklift on the dock. Plaintiff would take the cargo from one point on the pier to another point closer to the ship. He was injured during this process.

The court first considered the minority view of "loading" ships. "One approach . . . is to define 'loading' in an exceedingly narrow and mechanical fashion, limiting it to those activities which begin with the physical act of lifting the cargo onto the vessel." 432 F.2d at 380. The court cited as illustrative of this doctrine *Drumgold* v. *Plovba,* 260 F.Supp. 983 (E.D. Va. 1966). The court then noted that "the more prevalent view, however, is found in cases which define the terms 'loading' and 'unloading' in a more pragmatic and less ritualistic sense." 432 F.2d at 383.

The court concluded:

> We choose to align ourselves with the cases which define "loading" and "unloading" in a realistic sense rather than as hypertechnical terms of art. . . . He was a part of a group of longshoremen who were engaged in the total operation of moving cargo from the dock to the vessel. . . . The efforts of both the ship-side workers and the shore-side workers were necessary to load the ship. . . . Laws' activities had proximity to and continuity with the job at hand—the task of loading cargo aboard the [ship]. His specific job performance was so integrally woven into the entire loading operation that the two cannot be separated except by the erection of hypertechnical and unrealistic legal barriers. If the terms . . . are to be terms associated with reality rather than mere conceptual microcosms without adjuncts beyond the ship's beam, we have no choice but to conclude that the plaintiff Law was engaged in loading the [ship]." 432 F.2d at 384.[15]

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[15] The Supreme Court reversed this opinion of the Fifth Circuit in Victory Carriers, Inc. v. Law, 404 U.S. 202, but on grounds which had nothing to do with the Fifth Circuit's approach to "loading and unloading." The Supreme Court reversed as to *liability*, holding that state workmen's compensation laws applied since the LHWCA could only apply within the reach of federal admiralty jurisdiction, *i.e.,* on the "navigable waters" of the United States. This opinion inspired in part the effort to amend the LHWCA so as to include certain shore-based facilities within the definition of "navigable waters."

The Supreme Court did *not* reverse the Fifth Circuit on the ground that it had incorrectly determined that Law was engaged in loading the ship. Indeed, this is made explicitly clear in footnote 14 of the opinion, 404 U.S. at 214. There the Supreme Court held that limiting coverage under the LHWCA to work performed on "navigable waters" would make it unnecessary for the Court to become involved in the proper one, and would suggest that this circuit has in fact adopted this view in the *Gutzeit* case, discussed *infra.*

Since the reversal was not grounded in the Fifth Circuit's definition of loading and unloading, I think that such an approach is still a dispute over what is and is not "loading and unloading." *Id.*

In *McNeal* v. *Havtor,* 326 F.Supp. 226 (E.D. Pa. 1971), plaintiff's job was to operate a "squeeze lift" truck within the confines of a warehouse or pier shed. His job was to lift and transfer cases from pallets owned by one company to pallets owned by the defendant. The plaintiff never went aboard a vessel, and his function was simply to move cargo from one pallet to another inside the pier shed. Plaintiff was injured due to some defect in the truck. The court stated:

> Defendant asks that we characterize libelant's job as a mere transfer of materials from the place on the pier warehouse to another place within the warehouse. . . . We cannot subscribe to . . . the narrow characterization urged by defendant. The more prevalent view which is well supported by authoritative case law is to define the term "loading" in a realistic, pragmatic and non-ritualistic manner.

326 F.Supp. at 228.

The court states the rule thus:

> Where the conduct in question is a direct and necessary step in the loading operation and where the equipment being used is necessary for that purpose, libelant must realistically be considered as engaged in the loading process of the vessel for the purposes of unseaworthiness.

326 F.Supp. at 229.

The court also noted that:

> [B]ecause the work was done by three separate longshoring gangs in three integrated steps does not make the entire operation any less a loading operation. . . . In a realistic sense, the loading process must begin

> somewhere. We hold, on the present record, that it at least begins when the intended cargo in the pier shed begins its movement towards the ship. We consider it a strained analysis that the process of loading may only be characterized as the actual physical lifting of the cargo into the ship's hold.

326 F.Supp. at 229.

Garrett v. *Gutzeit,* 491 F.2d 228 (4th Cir. 1974), is a Fourth Circuit case decided in 1974. The factual situation involved unloading bales of paper from a ship. The cargo was removed from the ship and set down on the pier where other members of the longshoring gang then moved the bales one at a time on hand trucks into a pier shed. As they arrived in the shed, plaintiff's job was to take the cargo off the hand trucks and stack the bales four-high. The court noted that "the cargo was transferred from the pier apron and stacked in the shed to facilitate the removal of more bales from the hold." 491 F.2d at 230. When one of the metal bands encasing the cargo snapped, the plaintiff was injured.

The court held:

> The [district] court apparently concluded that "unloading" ceases when the cargo is no longer in contact with the ship, *i.e.,* when the bales were deposited on the pier and discharged from the ship's gear. Although we find this theory appealing because of its ease of application, we believe that the case law rejects such a narrow definition of "unloading."

491 F.2d at 228.

The case is also important because it apparently rejects the narrow definition of "loading and unloading" set forth in *Drumgold, supra,* 260 F.Supp. 983. The court first noted

the district court's reference to its prior decision in the *Drumgold* case, and held:

> We, however, are guided by the historical development of the warranty rather than by arbitrary definitions of admittedly amorphous terms. . . . The record in the instant case demonstrates that it was necessary to move the bales away from the side of the ship as they were discharged from the ship's gear so the additional bales could be unloaded. It was, therefore, a necessary step in the unloading operation.

491 F.2d at 236.

The *Gutzeit* case is important to this appeal because it aligns this circuit with the view that "loading and unloading" are not "words of art" and ought rather to be given a "realistic" meaning.

The only realistic conclusion in this appeal is that Brown, Harris, and Adkins were all engaged in the overall process of loading and unloading ships. Donald Brown was a forklift operator employed to pick up cargo inside a warehouse and load it into large containers which, when sealed, would be placed aboard a ship. Vernie Lee Harris was a hustler driver who moved containers "stuffed" with cargo from a long term storage lot to a marshaling area adjacent to the pier. Adkins operated a forklift truck inside a pier shed, and would pick up cargo recently "stripped" from containers and load these pallets into trucks for shipment to the ultimate consignee. All three worked on terminal premises, *i.e.*, on "navigable waters." All three were required to subject themselves to the risks inherent in moving and handling cargo and in operating the potentially dangerous machinery of the trade. All three were injured as the direct result of the hazards of such employment. In my opinion, these three

plaintiffs were injured in the process of loading or unloading a ship while upon navigable waters. The plain language of the statute requires no more (and indeed, less) than this, and neither should this court. But if I am wrong, and these plaintiffs were not engaged in longshoring work, surely they must be found to have been engaged in maritime employment—the generic term—or else it seems to me the Congress has legislated in vain.

I dissent.

APPENDIX C

DECISION OF THE BENEFITS REVIEW BOARD

U.S. DEPARTMENT OF LABOR

BENEFITS REVIEW BOARD

Washington, D. C. 20210

BRB Nos 74-177 and 74-177A

Donald D. Brown

Claimant-Respondent
Cross Petitioner

v.

Maritime Terminals, Inc.

Employer

and

Aetna Casualty & Surety Co.

Insurance Carrier
Petitioners
Cross Respondents

Appeal from Decision and Order of Joyce Capps,
Administrative Law Judge, United States
Department of Labor.

Filed As Part Of The Record
December 6, 1974
/s/ Carolyn D. McCready, Clerk

DECISION

* * *

Hartman, Member:

These appeals by both the employer-carrier and by the claimant are from a decision and order (74-LHCA-207) of Administrative Law Judge Capps filed on August 30, 1974, awarding temporary total disability compensation, medical expenses and an attorney's fee. The claim arises pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, as amended, 33 U.S.C. §§ 901 *et seq.*

The claimant, a longshoreman since 1969, was employed by Maritime Terminals, Inc., as a forklift driver. He was a member of a gang that loaded cargo from a warehouse into shipping containers. The warehouse was located on the premises of the Norfolk International Terminal approximately 800 feet from a navigable waterway.

The claimant was injured on May 9, 1973, when he became nauseated from the forklift exhaust fumes and sustained carbon monoxide intoxication.

The administrative law judge found that the claimant was injured while engaged in maritime employment as described in Sections 2(3) and 2(4) of the Act, 33 U.S.C. §§ 902(3) and 902(4), and while within the coverage of Section 3(a) of the Act, 33 U.S.C. § 903(a). It was found that the stuffing of cargo containers was an integral and essential part of the total process of loading cargo aboard a vessel and therefore that the claimant was an employee in maritime employment. In addition, it was found that the situs of the injury, the terminal, was specifically included as an area coming within the coverage of Section 3(a) of the amended Act. The claimant was awarded temporary

total disability compensation from the date of the injury through May 23, 1974. The administrative law judge determined that the claimant suffered no disability after that date.

The employer-carrier has appealed alleging that the claimant was not injured while loading or unloading a vessel or while engaged in maritime employment, that the employer was not an "employer" as defined by Section 2(4) of the Act and that the injury did not occur upon navigable waters as required by Section 3(a) of the Act.

The 1972 amendment to Section 2(3) of the Act enlarged its coverage to include "any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations. . . ." The evidence clearly shows that the claimant has been a longshoreman since 1969 and was engaged in longshoring operations at the time of his injury. The Board finds that the claimant's status at the time of the injury was that of an "employee" as defined by Section 2(3) of the Act.

Section 3(a) of the Act, as amended, extended coverage under the Act to those employees injured on navigable waters which now includes "any adjoining area." The finding that claimant was injured in an adjoining area clearly places the situs of his injury within the coverage of Section 3(a) of the Act. The extension of coverage to include the claimant pursuant to Section 3(a) is indicated by the Legislative History of the Amendments. *See Avvento* v. *Hellenic Lines, Ltd.*, BRB No. 74-153 (November 12, 1974).

The Board finds that there is substantial evidence in the record to support the finding of the administrative law judge that the claimant was injured while within the scope of coverage as enlarged by the 1972 amendments to the Act and that the claimant and employer were engaged in maritime employment.

The sole issue raised by the claimant in his appeal is that the finding of the administrative law judge that he was not entitled to compensation after May 23, 1974, is not supported by substantial evidence in the record.

The administrative law judge found that the claimant sustained carbon monoxide poisoning and a post-trauma neurosis which was permanent partial in character. However, the administrative law judge also found that the claimant was entitled to no compensation because he suffered no loss of earning capacity after May 23, 1974, as prescribed in Sections 2(10) and 8(h) of the Act, 33 U.S.C. §§ 902(10) and 908(h). It was also held that the claimant had the burden of showing that he could not obtain "suitable gainful employment."

The Board finds that the administrative law judge incorrectly ruled that the burden was on the claimant to prove that he could not obtain employment. This Board has consistently held that the employer has the burden of establishing that an employee who proves that he is disabled from his regular employment, has actual opportunities to obtain other employment. *Fallis* v. *N.C.O. Open Mess,* BRB No. 74-164 (October 22, 1974); *Offshore Food Service, Inc.* v. *Murillo,* BRB No. 141-73 (May 15, 1974); and *Virginia Hotel Co.* v. *Mills,* BRB No. 133-73 (April 2, 1974). See *Perini Corp* v. *Heyde,* 306 F.Supp. 1321 (D.R.I. 1969).

There is no evidence in the record to show that the claimant could compete successfully in the labor market or command the same wages that he did prior to his injury in 1973. The extent of the claimant's disability must be evaluated in economic rather than medical terms. *American Mutual Insurance Co. of Boston* v. *Jones,* 426 F.2d 1263 (D.C. Cir. 1970). The claimant's age is just one of the

factors to be considered when making a determination of his disability. Other factors which must be considered are the claimant's education, industrial history or work experience and the availability of employment which the claimant can do. *Cunnyngham* v. *Donovan,* 271 F.Supp. 508 (E.D. La. 1967), *aff'd,* 403 F.2d 223 (5th Cir. 1968), *cert. denied,* 394 U.S. 343 (1969).

This case is remanded to the administrative law judge for the determination of whether or not the claimant suffers any permanent disability and, if so, the degree thereof.

The Board awards the claimant's attorney the sum of $500 for the prosecution of the cross-appeal and $700 for the defense of the employer-carrier's appeal as attorney's fees and costs. 33 U.S.C. § 928.

That portion of the award not remanded is hereby affirmed.

/s/ Ralph Hartman
Ralph M. Hartman, Member

We Concur:

/s/ Ruth V. Washington
Ruth V. Washington, Chairperson

/s/ Julius Miller
Julius Miller, Member

Dated this 6th day of December 1974

APPENDIX D

DECISION OF THE BENEFITS REVIEW BOARD

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
Washington, D. C. 20210

BRB No. 74-178

Vernie Lee Harris
Claimant-Respondent

v.

Maritime Terminals, Inc. and
Aetna Casualty & Surety Company
Employer/ Carrier
Petitioners

Appeal from Decision and Order of Thomas F. Howder, Administrative Law Judge, United States Department of Labor.

Filed As Part Of The Record
February 3, 1975
/s/ Carolyn D. McCready, Clerk

DECISION

* * *

Miller, Member:

This is an appeal by the employer and carrier (hereinafter jointly referred to as the employer) from a decision and order (74-LHCA-108) of Administrative Law Judge Howder filed on August 22, 1974, awarding temporary total disability compensation, medical expenses, attorney's and witness' fees. This claim was filed pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq.* (hereafter referred to as the Act).

The claimant, a longshoreman, was injured on July 3, 1973, in the course of employment. He sustained injuries to his head and neck when the steering mechanism and/or the brakes of the vehicle that he was driving malfunctioned and the vehicle collided with a container within the terminal area. He was disabled from July 3, 1973 through August 1, 1973.

At the time of the injury, the claimant was employed to operate a hustler, a truck-like vehicle used to transport cargo containers. His duties required him to transport loaded cargo containers from the terminal storage area onto the area adjacent to the pier where they would be loaded aboard a vessel, and to transport loaded cargo containers which had been unloaded from a vessel onto the area adjacent to the pier to the terminal storage area. All of these duties were performed within the geographic confines of the Norfolk International Terminal.

The only issue for determination by the administrative law judge was whether the claimant came within the scope of the Act at the time of injury. He found the claimant to be

engaged in maritime employment as defined in Section 2(3) of the Act, 33 U.S.C. § 902(3), at the time of his injury and that the injury occurred in an area adjoining navigable waters customarily used by an employer in loading and unloading vessels pursuant to Section 3(a) of the Act, 33 U.S.C. § 903(a). Compensation was awarded accordingly.

The employer has appealed alleging that the claimant was not an employee and that Maritime Terminals, Inc., was not an employer as defined by Sections 2(3) and (4) of the Act, 33 U.S.C. §§ 902(3) and (4). This argument is based on the fact that the employer did not engage in the actual stowing aboard or removal of cargo containers from vessels. These duties were performed by an independent stevedoring company.

Section 21(b)(3) of the Act, 33 U.S.C. § 921(b)(3), and the law as summarized in *O'Keeffe* v. *Smith Associates*, 380 U.S. 359 (1965), require the Board to affirm the decisions of the administrative law judge when that decision is supported by substantial evidence, is not irrational and is in accordance with law.

An employee does not have to be engaged in the loading or unloading of vessels in order to be engaged in longshoring operations. *Coppolino* v. *International Terminal Operating Co., Inc.*, 1 BRBS 205, BRB No. 74-136 (Dec. 2, 1974). An "employee" only need be engaged in maritime employment as provided in Section 2(3) of the Act which term includes "any longshoreman or other person engaged in longshoring operations." The claimant at the time of his injury was engaged in an intermediate but essential step in the overall process of loading cargo aboard vessels. These duties are an integral part of a continuous longshoring operation and support the finding that the claimant was engaged in maritime employment pursuant to Section 2(3) of the

Act. *Adkins* v. *I.T.O. Corporation of Baltimore,* 1 BRBS 199, BRB No. 74-123 (Nov. 29, 1974).

If the claimant is an "employee" within the meaning of Section 2(3) of the Act, it follows that his employer is an employer within the meaning of Section 2(4) of the Act. The fact that stevedoring companies other than the employer actually load and unload cargo containers on or from a vessel is of no consequence. There is no requirement in Section 2(4) of the Act that an employer be engaged in loading and unloading to qualify as a maritime employer. The controlling factor is whether any of its employees are employed in maritime employment. *Avvento* v. *Hellenic Lines, Ltd.* and *Liberty Mutual Insurance Company,* 1 BRBS 174, BRB No. 74-153 (Nov. 12, 1974).

The final issue raised in this appeal is whether the claimant was injured in an area which falls within the coverage prescribed by Section 3(a) of the Act. That section, as amended, extended coverage of the Act inland from the edge of navigable waters to include "any adjoining pier, wharf, . . . *terminal* . . . or other adjoining area customarily used by an employer in loading [or] unloading . . . a vessel."

The record in this case clearly indicates that the accident occurred at a maritime terminal directly adjoining navigable waters. The employer contends that, because it was not engaged in the actual loading and unloading of cargo containers onto or from a vessel, the situs of the claimant's injury was not within the coverage of Section 3(a) of the Act. The Board rejects the employer's argument as Section 3(a) of the Act only requires that the terminal or the adjoining area be customarily used by *an* employer in loading or unloading vessels and not by *the* specific employer.

The Board finds that the claimant was injured within a terminal customarily used by an employer in loading or unloading vessels as provided in Section 3(a) of the Act and, therefore, the jurisdiction of the Act has not been improperly extended.

The Board awards a fee to the claimant's attorney in the amount of $429 for services performed in defense of this appeal, such fee to be paid directly by the employer to the attorney in addition to the compensation awarded.

The decision and order appealed from is affirmed.

/s/ Julius Miller
Julius Miller, Member

We Concur:

/s/ Ruth V. Washington
Ruth V. Washington, Chairperson

/s/Ralph Hartman
Ralph M. Hartman, Member

Dated this 3rd day of February, 1975

APPENDIX E

DECISION AND ORDER OF ADMINISTRATIVE LAW

JUDGE THOMAS F. HOWDER

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Washington, D. C. 20210

Case No. 74-LHCA-108
(Formerly No. 5-7698)

In The Matter Of

Vernie Lee Harris

Claimant,

v.

Maritime Terminals, Incorporated

Employer,

Aetna Casualty and Surety Company

Carrier,
Respondents.

* * *

Before: Thomas F. Howder, Administrative Law Judge

DECISION AND ORDER

This proceeding involves a claim arising under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat 1424, as amended, 33 U.S.C. 901, *et seq.* (hereinafter "Act") and the Rules and Regulations implementing the Act, 20 C.F.R. Parts 701 and 702.

A hearing in this case was held before me in Norfolk, Virginia, on May 24, 1974. The parties were represented by counsel and were afforded full opportunity to be heard, to adduce evidence, to call, examine and cross-examine witnesses and to file briefs.

Upon the entire record in this case, and from my observation of the witnesses and their demeanor, I make the following findings, conclusions and Order.

Findings And Conclusions

On July , 1973, claimant longshoreman Vernie Lee Harris suffered injuries to his head and neck at Norfolk International Terminals, when the "steering" or braking mechanism malfunctioned on the "hustler" vehicle he was operating, resulting in a collision with a parked container. His injuries caused claimant to be absent from work until August 2, 1973 (except for a two-hour period on July 23, 1973). All medical expenses for treating claimant have been paid by respondents and he has received compensation under the Virginia statute. The only issue in this proceeding is whether Mr. Harris is entitled to receive the added benefits available under the Federal Act.[1]

As to the geographical location of the accident, I find in favor of the claimant for the following reasons: Prior to the 1972 amendments to the Act, compensation was payable only if disability or death resulted from an injury occurring upon navigable waters. Thus, coverage stopped at the

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[1] It is settled law that acceptance of benefits under a state act does not constitute an election which precludes recovery under the Federal Act. *Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114 (1962).

waters' edge and injuries occurring on land were compensable only under state workmen's compensation laws.[2] In enacting the 1972 amendments, Congress recognized the inequity of denying coverage to an employee engaged in the loading and unloading process, merely because the injury happened to occur on land. Thus, Section 3(a) now provides: "Compensation shall be payable under this Act in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (*including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing or building a vessel*)." (Emphasis supplied.)

As noted heretofore, the accident occurred on the premises of the Norfolk International Terminals. In view of the broad language of the statute, including its express reference to "terminal," the conclusion is ineluctable that the claim falls within the coverage of the Act from the standpoint of situs.[3]

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[2] In *Nacirema Operating Co.* v. *Johnson*, 396 U.S. 212 (1969), the Supreme Court followed and applied the literal language of the pre-amended Act and denied recovery to one longshoreman who was killed and to two who were injured while working on the dock while engaged in a ship loading operation. The Court held that the statute, as it then existed, did not permit compensation for injuries to longshoremen occurring on piers permanently affixed to the shore.

[3] Indeed, the legislative history of the amended statute specifically reveals the congressional intention of extending coverage beyond the water's edge. As stated in the Senate Report accompanying the legislation: "The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstances of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage to longshoremen, harbor workers, ship repairmen, shipbuilders, shipbreakers, and other employees engaged in maritime employment (excluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel." *S. Rep No.* 92-1125, 92*d Cong., 2d Sess.*, 13 (*Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments* of 1972 (GPO 1972), 75).

The question thus becomes one of determining the type of activity in which claimant was engaged, since the act was not intended "to cover employees who are not engaged in loading, unloading, repairing or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity."[4]

The 1972 amendments to the Act contain the following definitions of employer and employee (Section 2):

> (3) The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harbor worker including a ship repairman, ship builder, and ship-breaker, * * *.
>
> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by the employer in loading, unloading, repairing, or building a vessel).

Claimant described his duties as being those of a longshoreman; identified himself as a member of Local 1248 of the International Longshoremen's Association; and testified that only longshoremen union members were permitted to operate "hustlers." However, the name or descriptive designation given to a worker, or the fact of union mem-

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[4] *Ibid.*

bership are not controlling on the question of maritime employment. Rather, it is the type of work being performed at the time of the injury which is determinative. *Olvera* v. *Michelos,* 307 F.Supp. 9 (S.D. Tex. 1968).

Mr. Harris' regular occupation was to operate "hustlers" for respondent Maritime Terminals, although when not needed in that capacity he would work as a general longshoremen for stevedoring companies, generally aboard ship.[5] "Hustlers" are vehicles which are used to move containers about the terminal. Claimant's normal duties consisted of transporting containers from a point near the ship where they had been deposited in the unloading process, to a storage area on the terminal; and, conversely, bringing containers loaded with cargo from a storage area to a point near the ship for loading aboard. On the day of claimant's accident, he had finished bringing a container to the area adjacent to the pier, and was returning to the storage area for another container.

Respondents' counsel points out that Maritime Terminals, Inc., is the operator of the terminal in question,[6] but insists that such respondent is in no way engaged in the loading or unloading of vessels (unlike situations which may exist in other ports). This latter work, we are informed, is done on a contract basis by the various stevedoring companies in the Norfolk area, who employ longshoremen for this purpose. Respondents state that when containers are discharged from a vessel, they are moved by longshoremen to nearby pad

[5] Claimant testified there were occasions when he worked both as a driver and as a general longshoreman on the same day.

[6] At the hearing respondents contended that Maritime Terminals, Inc., was a political subdivision of the State of Virginia, employees of which are excluded from compensation under Section 3(a)(2) of the Act. By letter of June 27, 1974, respondents' counsel informed me that this contention was withdrawn from the proceeding.

areas, designated as "points of rest." Conversely, when vessels are loaded, longshoremen employed by stevedoring companies move the containers from the pads to the pier for loading aboard. It is respondents' position that since claimant's job was the movement of containers on the landward side of the "point of rest," he is not covered by the Act.

I believe that respondents' views on the question of maritime employment in this case are unduly narrow. The Longshoremen's and Harbor Workers' Compensation Act is a remedial statute, and should be interpreted broadly so as to give effect to the purpose of Congress in enacting it. *Gibson* v. *Hughes,* 192 F.Supp. 564, 571 (S.D. N.Y. 1961); *Chausse* v. *Lowe,* 35 F.Supp. 1011, 1013 (E.D. N.Y. 1938). In amending the statute, it is clear that Congress intended to upgrade the benefits available to injured longshoremen and to extend coverage to protect additional workers in the performance of their maritime duties ashore.[7] For this reason I believe the restrictive approach would be inappropriate in resolving the question of claimant's maritime employment.

I find that claimant was engaged or employed in maritime employment at the time of his injury for the following reasons: Where containers are used it is no longer necessary to engage in the economically wasteful, time consuming practice of loading individual items of cargo on the ship. The presence of a ship at the pier is unnecessary; the initial loading step can commence with the stuffing of containers ashore. Thereafter, the containers can be stored, until it is time to take them to the pier in preparation for stowing on the vessel itself. Since, when the accident occurred, claimant was engaged in activity relating to transporting containers from one storage area to an area nearer the pier, to await

[7] *Legislative History, supra* at 63.

the expected arrival of a ship, in my view he was engaged in maritime activity within the meaning of the Act. He was engaged in an intermediate step in the overall loading process of the vessel, using improved modern methods.

The Senate Report accompanying the 1972 amendment recognized that "with the advent of modern cargo-handling techniques such as containerization * * *, more of the longshoreman's work is performed on land than heretofore." It stated (*Legislative History, supra* at 75):

> The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo, whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the adjoining land area.

Respondents proffer their "point of rest" as being the appropriate demarcation line concerning the completion of unloading or the commencement of loading. They offered in evidence a Terminal Tariff applicable in Norfolk defining this term,[8] and in their brief cited various authorities for the proposition that the notion of "point of rest" has its origin in the general maritime law, and that historically the unloading operation ended and the responsibility of the vessel to cargo ended when cargo was delivered to a fit and proper wharf.

[8] Respondents' Exhibit 1: Terminal Tariff No. 1-C, p. 18, Item 290, Norfolk Marine Terminal Association.

I have examined the cases cited by respondents, decades old, which all refer to the elements necessary under maritime law to relieve the sea carrier of responsibility for transported cargo vis-a-vis the owner or consignee. One of these elements is the deposit of the goods upon an appropriate wharf. Whether or not these elements are in whole or in part valid under present maritime law, they are clearly not controlling or persuasive on the concept of loading or unloading under the amended Longshoremen's Act where containerization is involved.[9] As I see the matter, the use of containers in loading a vessel is an overall process composed of a series of intermediate steps, begun when the containers are filled and completed when the containers are finally stowed aboard. The participation of claimant Harris in one intermediate step in that process constitutes maritime employment, and qualifies him for compensation under the statute.[10]

In so concluding, I am aware of the fact that the term "loading" has been the subject of much litigation, with differing results.[11] I agree, however, with the court's reasoning in *Litwinowicz* v. *Weyerhaeuser Steamship Company,* 179 F.Supp. 812 (E.D. Pa. 1959), involving plaintiffs injured while working on a railroad car placing wooden "chocks" under a draft of steel beams being prepared for hoisting aboard ship. The court rejected defendant's contention that

[9] In the same vein, the definition of "point of rest" embodied in the Tariff may be quite valid and useful in the Norfolk area concerning responsibility for cargo. But it too is neither controlling nor persuasive on the question of maritime employment under the Act, for the reasons set forth in this opinion.

[10] I am speaking of activity pertaining to containers which occurs at the terminal. I make no finding nor express any view respecting such activity as might occur away from the premises.

[11] See *Victory Carriers, Inc.* v. *Law,* 404 U.S. 203, 214, n. 14 (1971).

plaintiffs were merely preparing cargo for loading, rather than participating in the actual loading. It held, 179 F.Supp. at 817-18:

> The term loading is not a word of art, and is not to be narrowly and hypertechnically interpreted. Plaintiffs' actions at the time of the accident were direct, necessary steps in the physical transfer of the steel from the railroad car into the vessel, which constituted the work of loading.

On the basis of the foregoing findings and conclusions, I issue the following:

Order

1. The respondents shall pay to claimant compensation for temporary total disability pursuant to Section 8(b) of the Act, for the period July 3, 1973 through August 1, 1973 at the rate of 66⅔% of his stipulated average weekly wages of $222.00, less any sums paid to claimant for this purpose under the workmen's compensation statute of the State of Virginia.

2. Respondents are liable for the reasonable medical expenses of claimant incurred because of his injury, and shall pay any which may be due and payable, as provided in Section 7 of the Act.

3. Interest on accrued payments to claimant shall be paid at the rate of 6% per annum, computed from the date each payment was originally due. *Humble Oil and Refining Co.* v. *Taliaferro,* BRB No. 107-73 (June 1, 1973).

4. Respondents are directed to pay the amount of $1500 to the law firm of Breit, Rutter & Montagna for legal services rendered in connection with this case pursuant to Section 28(a) of the Act. In so directing, I take into account the extended briefing by counsel for claimant on the question of whether respondent Maritime Terminals, Inc., is a political subdivision under Section 3(a)(2) of the Act, an issue withdrawn from the case by respondents. That firm is directed to equitably recompense Stuart V. Carter, Esq., for the services he personally performed for claimant prior to leaving the firm.

5. The further requests of counsel for claimant, that expert witness fees of $150.00 be approved in favor of Edward L. Brown, President of ILA Local 1248, and Alexander Hall, Business Agent of the same organization, are rejected. Mr. Brown did not testify in this proceeding, and I hold that witness Hall is eligible to receive the same witness fee and mileage as witnesses receive in courts of the United States (33 U.S.C. § 925), and I direct payment to Mr. Hall of such amounts by respondents.

/s/ Thomas F. Howder

Thomas F. Howder
Administrative Law Judge

Dated: August 15, 1974
Washington, D. C.

APPENDIX F

DECISION AND ORDER OF ADMINISTRATIVE LAW JUDGE JOYCE CAPPS

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Washington, D. C. 20210

Case No. 74-LHCA-207
(Formerly 5-8200)

In the Matter of

Donald D. Brown

Claimant

vs.

Maritime Terminals, Inc.

Employer

and

Aetna Casualty & Surety Co.

Carrier

* * *

Before: Joyce Capps, Administrative Law Judge

DECISION AND ORDER

Pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. 901 *et seq.* (hereinafter referred to as the Act), and the Rules and Regulations implementing said statute, 20 C.F.R.

Parts 701 and 702, a hearing in the above-captioned matter was held before me on June 5, 1974, in Norfolk, Virginia. At commencement of the hearing parties submitted a Stipulation Agreement of certain facts, including attachments, which was received as a pleading and is hereby incorporated as part of the record. All parties were represented by counsel and were afforded full opportunity to be heard, to adduce evidence, and to examine and cross-examine witnesses. A designee of the Solicitor of Labor appeared and participated on behalf of the Director of the Office of Workers' Compensation Programs pursuant to 20 C.F.R. 702.333(b). Thereafter, the parties filed excellent comprehensive post-hearing briefs in support of their respective positions which have been duly considered.

The issues involved are (1) whether Claimant and Employer were engaged in maritime employment at the time of Claimant's injury as required by Sections 2(3) and (4) of the Act, respectfully, (2) whether the situs of the injury falls within the purview of Section 3(a) of the Act, and (3) the nature and extent of injury.[1]

Based upon the entire record herein and from observation of the witnesses and their demeanor, I make the following Findings of Fact, Conclusions of Law, and Order:

Findings of Fact

It has been stipulated by the parties, and is so found, that (1) since May 17, 1973, the Employer has been paying Claimant compensation at the rate of $70.00 per week pursuant to the Virginia Workmen's Compensation Act,

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[1] By letter from their counsel dated July 22, 1974, Respondents withdrew their defense that Marine Terminals, Inc., is a subdivision of the Commonwealth of Virginia. Therefore, the applicability of Section 3(a)(2) of the Act is no longer an issue.

(2) Claimant's average weekly wage at the time of injury was $222.00 and (3) there are outstanding medical bills as follows: Dr. George N. Cavros, $3.00; Dr. Robert H. Thrasher, $562.50; and Dr. Herbert M. Brewer, $4.00.

The Claimant was born on January 24, 1949. He has been a member of Local 1248 of the International Longshoremen's Association since 1969, his classification being that of a forklift (tow motor) driver on the docks.

On May 9, 1973, he was employed by Marine Terminals, Inc. on a five-member "stuffing" gang working in a warehouse on the premises of the Norfolk International Terminals and approximately 800-850 feet from the water's edge of the Elizabeth River, a navigable waterway of the United States. The gang was engaged to stuff a container with cartons of cotton piece goods and some barrels of chemicals which were loaded on a vessel the following day bound for England. Claimant's specific job was to operate the forklift used to move the cargo into the container, which work was performed back and forth in the warehouse, on the apron, and in the container itself. The 8′ x 8′ x 40′ container had one opening and was otherwise enclosed.

After 2½ hours of operating the forklift in and out of the container, Claimant became nauseated from exhaust fumes and sustained carbon monoxide intoxication. Dr. Donald M. Levy, one of his treating physicians stated in his report dated May 25, 1973, that "prognosis for ultimate complete recovery is excellent," although on June 4, 1973, he stated to Dr. Levy that "his dizziness and headaches persist daily and frequently each day." On June 29, 1973, Dr. Levy referred Claimant to a psychiatrist, Dr. Robert H. Thrasher, for treatment of an anxiety reaction following the injury. On June 12, 1973, the Claimant returned to work but had to leave the job because of dizziness and chest pain. This was his only attempt at working. As of June

19, 1973, Claimant had recovered from his physical illness, but still has, according to the testimony of Dr. Thrasher, a post-traumatic neurosis, manifested by anxiety and depression, and in all probability a phobic reaction which involves a fear of returning to work and sustaining re-injury from carbon monoxide.

In his report dated October 2, 1973, Dr. Thrasher stated that he hoped to encourage Claimant to return to his former job sometime about the middle of November 1973. However, after treating Claimant for his anxiety reaction up until May 24, 1974, Dr. Thrasher is now of the opinion that no further treatment by him would relieve Claimant of his present condition to the extent that he can ever return to occupations that involve working in confined areas where he is going to be exposed to carbon monoxide or gasoline fumes. He said Claimant might still need psychiatric help if he changes his occupation and gets retraining along lines that require new skills and efforts. He stated further, however, that Claimant is capable of performing any kind of longshoring or other work where he will not be exposed to such fumes.

Containerization is a modern cargo handling technique which has taken the place of work that longshoremen did in earlier years in handling conventional cargo and in banding it together for getting it aboard ship. *H. Rep. No. 92-1441, 92d Cong., 2d Sess., September 25, 1972.* From 75% to 80% of all cargo going in and out of the Norfolk International Terminals is containerized. One of the advantages of containerization is that cargo can be sorted and loaded into large containers days or even weeks before the vessel for which it is destined arrives in port. Therefore, when the ship is in port, the pre-stuffed (i.e., pre loaded) containers are loaded thereon in a much shorter time and by

substantially fewer longshoremen than would have been utilized in pre-containerization days when loose items of cargo were tied or bundled together and each individual bundle was manually loaded onto the vessel.

Marine Terminals, Inc., is in the business of moving cargo coming into or leaving the terminal by ship, rail, or truck, and has the responsibility of the operation and administration of the entire facility at Norfolk International Terminals. The journey of loading cargo intended for ship transport via containers begins with the "stuffing" gang whose job is to sort the cargo intended for a particular vessel and load it into containers. This work is usually performed in a stuffing shed or warehouse, although it can be and sometimes is performed at pierside. A full container is then sealed and driven by a "hustler" or terminal driver to a storage area or a "pad" area where it is stacked with other containers to be loaded onto a vessel when the vessel arrives in port. The "pad" area is referred to as the "point of rest" between Marine Terminals, Inc., and the particular stevedore company that has contracted with the steamship operator of the vessels for which such container is destined to load that particular vessel. Marine Terminals. Inc., is liable for the cargo and hires the longshoremen who perform the work involving such cargo up to this point. Thereafter, the stevedore company is liable for such cargo and any movement of the cargo from the "point of rest" is performed by longshoremen hired by the stevedore company. A container normally remains in the pad area from one to three days before the vessel arrives. When the vessel arrives, the "hustler" driver transports the container from the "pad" area to pierside where the "dock" gang hooks it up for hoisting onto the vessel. The 'ship" gang receives the hoisted container and stows it in the hold of the ship, and

this completes the loading process of such cargo. The Union agreement (Claimant's Exhibit No. 3) provides that all stuffing, stripping, and handling of containers must be done by ILA longshore labor, and that such work shall be performed on a waterfront facility, pier or dock.

Conclusions of Law

1. Claimant sustained an injury that occurred in an adjoining area of the navigable waters of the United States which is customarily used by his employer in loading and unloading vessels, and at the time of his injury he was engaged in maritime employment, and is, therefore, entitled to compensation within the provisions of the Act.

The geographical or situs aspect of coverage was expanded by the 1972 amendments to include injuries occurring not only upon the navigable waters of the United States, but upon *any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel.* 33 U.S.C. 903(a). An employee is defined in the Act as "any person engaged in maritime employment, including any longshoreman or other person engaged in *longshoring operations* * * *," which for the first time imposes a "status" test which must be met by the Claimant in determining coverage.

The legislative history of the 1972 amendments reflects that one of the purposes of the amendments was to extend coverage beyond the water's edge to longshoremen engaged in maritime employment which includes longshoring operations. *S. Rep. No. 92-1125, 92d Cong., 2d Sess., 13 (Legislative History of the Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972* (GPO 1972), 75). The Act being remedial in nature should be interpreted

broadly so as to give effect to the purposes of its enactment. *Gibson* v. *Hughes,* 192 F.Supp. 564, 571 (S.D.N.Y., 1961). When Congress amended the Act and extended coverage it recognized that the process of loading vessels has been modernized with the advent of containerization and that the process must be considered pragmatically for purposes of coverage. *S. Rep. No. 92-1125, supra.*

Since the loading and unloading of cargo onto and from vessels is historically the job of a longshoreman and is maritime work, the basic question for determination in reaching the ultimate conclusion of coverage is whether the "stuffing" of cargo in a container for eventual loading onto a vessel constitutes a longshoring operation. I have determined that it does. The phrase "any person engaged in longshoring operations" does not require the narrow interpretation that one must actually and physically be loading or unloading a vessel to be covered, and the fact that Claimant was not actually loading a vessel at the time of his injury is not *ipso facto* sufficient to remove him from the protection of the Act. In *Litwinowicz* v. *Weyerhauser Steamship Co.,* 179 F.Supp. 812, 817-18 (E.D. Pa. 1959), the plaintiff was injured while working in a railroad car placing wooden chocks under a draft of steel beams preparatory to their being hoisted aboard a ship. Rejecting the defendant's claim that the plaintiff was merely *preparing the cargo for loading and not doing the actual loading,* the court said:

> The term loading is not a word of art, and is not to be narrowly and hypertechnically interpreted. *Plaintiff's actions at the time of the accident were direct, necessary steps in the physical transfer of the steel from the railroad car into the vessel, which constituted the work of loading.* [Emphasis Added.]

See also *Spann* v. *Lauritzen,* 344 F.2d 204 (3d Cir. 1965), *cert. denied,* 382 U.S. 938, 86 S.Ct. 386, 15 L.Ed.2d 348 wherein it was held that a longshoreman who was injured on the pier by a piece of equipment was engaged in unloading a ship when he was injured. The court reasoned that the equipment was an essential part of the unloading process because without its use the cargo could not have been unloaded from the vessel.

The basic difference in the process of loading vessels now as opposed to the days of pre-containerization is that *containers stuffed with cargo* are now hoisted onto the vessel rather than *loose individual items of cargo tied into bundles,* i.e., only the *form* in which such cargo is hoisted has changed. Both methods still require the preparatory activities of sorting and of putting such cargo in a secure compact unit before it can be hoisted from shore to vessel.

I envision the process of loading cargo onto a vessel as a continuous process comprised of various distinct segments or stages, beginning with the stuffing of sorted cargo into a container and ending with the container being properly positioned on the vessel. For this reason, I reject Respondents' contention that the loading process did not begin until the container that Claimant was stuffing when he was injured had reached the "pad" area. In short, I do not agree that the "pad" area is the line of demarcation as to coverage of shoreside injuries.

Since the cargo Claimant was handling at the time of his injury could not have been loaded onto a vessel without its first having been stuffed into a container, his job constituted an integral and essential part of the many-faceted total process of that cargo being loaded onto a vessel the day following his accident. The conclusion is inescapable that Claimant has met the "status" requisite of coverage in that

the work he was performing as a member of a "stuffing" gang is a longshore operation constituting maritime employment within the meaning and impact of Section 3(a) of the Act.

The 1972 amendments specifically included coverage of injuries occurring upon the terminal. The warehouse in which Claimant was working at the time of his injury was on the terminal premises. Therefore, Claimant has clearly satisfied the situs requirement of coverage.

2. It is concluded that on May 9, 1973, Claimant sustained carbon monoxide poisoning and a post-traumatic neurosis arising out of and in the course of his employment, and that the said neurosis has been sufficiently stabilized since May 24. 1974, to be considered permanent from that date forward.[2]

3. As a result of his injuries Claimant was temporarily totally disabled from May 9, 1973 to May 23, 1974, inclusive, and is entitled to compensation for said period of disability based on an average weekly wage of $222.00, with six percent interest from the date that each weekly payment became due until paid, less any sum paid by the Employer/Carrier under the Virginia Workmen's Compensation Act.

4. It is concluded that Claimant's neurosis is a permanent partial residual for which he is entitled to no compensation because he suffered no loss of earning capacity from May 24, 1974, onward, within the meaning of Sections 2(10) and 8(h) of the Act.

Section 2(10) defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury *in the same or any other employment.*" Section 8(c)(21) dictates that wage-earning capacity shall be the basis upon which compensation is awarded, i.e., "compensation shall be 66⅔ percentum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise * * * ." Section 8(h) sets forth the factors to be considered in determining the wage-earning capacity of an injured employee. It is well settled that this statutory framework commands that disability in a medical sense be translated into economic disability. *Welch* v. *Leavey.* 397 F.2d 189 (5th Cir. 1968); *Williams* v. *Donovan,* 234 F.Supp. 135 (E.D. La. 1964); *aff'd* 367 F.2d 825, *cert. denied* 386 U.S. 977.

There is a consentient of cases holding that the Act does not allow an award for either a permanent-partial or a permanent-total disability, aside from scheduled disabilities, unless there has been a loss of wage-earning capacity. *Owens* v. *Traynor,* 274 F.Supp. 770 (D .Md. 1966), *aff'd* 396 F.2d 183, *cert. denied* 393 U.S. 962, 89 S.Ct. 401, 21 L.Ed.2d 375; *Welch* v. *Leavey, supra; Miller* v. *O'Hearne,* 181 F.Supp. 105 (D. Md. 1960).

Claimant is 25 years old. and since June 29, 1973, has not suffered any physical impairment as a result of his May 9, 1973, injury. There is nothing in the record to suggest that he is in other than good physical condition. His only restriction concerning employment is a psychological inability to work in close spaces where he will be subjected to carbon monoxide or gasoline fumes. I agree with Dr. Thrasher that Claimant cannot resume his former job as a tow-motor operator, because tow-motors must be operated in containers which are closely confined and because obnoxious fumes emit from tow-motors. However, except for the one unsuccessful attempt to return to work on June 12, 1973,

[2] This is based on Dr. Thrasher's opinion that as of May 24, 1974, no further treatment would relieve Claimant of his present neurosis to the extent he can ever return to his former job as a tow-motor operator.

Claimant has made no effort to be re-classified by his union despite the fact that he is able, according to Dr. Thrasher, to perform all other longshore duties except that of tow-motor operator. At any rate, there is no evidence in the record demonstrating that he could not obtain employment similar to what he was doing before his injury if he had just tried. The burden is on him to show that he could not obtain suitable gainful employment either with his former employer or with some other employer, which burden he dismally failed to meet. *American Mutual Insurance Co. of Boston* v. *Jones,* 426 F.2d 1263 (D.C. Cir. 1970); *Vogler* v. *Ontario Knife Co.*, 223 App. Div. 550, 229 N.Y.S. 5 (1928); *Travelers Insurance Co.* v. *McLellan,* 302 F.Supp. 351 (E.D.N.Y. 1969); *John W. McGrath Corp.* v. *Hughes,* 289 F.2d 403 (2d Cir. 1961).

5. Claimant is entitled to medical benefits pursuant to Section 7 of the Act.

6. Counsel for Claimant has requested approval of a fee for legal services in the amount of $1,741.25 which I deem to be reasonable and hereby approve. He has also requested approval of certain costs and expenses totalling $463.00, of which $150.00 is for an expert witness fee paid to Alexander Hall, Business Agent for ILA Local 1248. I approve $313.00 of these requested expenditures, but disapprove the expert witness fee for Mr. Hall. I conclude that Mr. Hall was only entitled to the same witness fee and mileage that all witnesses receive in courts of the United States pursuant to 33 U.S.C. § 925.

Order

1. The Employer/Carrier shall pay to Claimant compensation for temporary total disability pursuant to Section

8(b) of the Act for the period of May 9, 1973, to May 23, 1974, inclusive, at the rate of 66⅔% of his average weekly wages of $222.00, with six percent interest from the date that each weekly payment became due until paid, less any sum paid by them under the Virginia Workmen's Compensation Act.

2. The Employer/Carrier shall pay all medical expenses in connection with Claimant's injuries pursuant to Section 7 of the Act, less any sums they have paid for this purpose under the State compensation act, and shall pay directly to the following doctors the amounts of their outstanding bills, to wit: Dr. George N. Carvos, $3.00; Dr. Robert H Thrasher, $562.50; and Dr. Herbert M. Brewer, $4.00.

3. The Employer/Carrier shall pay to Charles S. Montagna, Esquire, the sum of $1,741.25 for legal services rendered pursuant to Section 28(a) of the Act, plus the sum of $313.00 for approved costs and expenses and shall, in addition, reimburse him the amount of witness fee and mileage permitted under 33 U.S.C. § 925 for the attendance of Alex Hall as a witness for the claimant.

/s/ Joyce Capps

Joyce Capps
Administrative Law Judge

Dated: August 22. 1974
Washington, D. C.

APPENDIX G

DECISION AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Nos. 1004, 1014, 1044, 1111

September Term, 1975

Argued May 20, 1976 Decided July 1, 1976

Docket No. 76-4042

Pittston Stevedoring Corporation and
The Home Insurance Company,
Petitioners.

v.

Anthony Dellaventura,
Respondent,

and

Director, Office of Workers Compensation
Programs, U.S.D.L.,
Party in Interest.

Docket No. 76-4009

Northeast Marine Terminal Company, Inc., Employer and
State Insurance Fund, Carrier,
Petitioners,

v.

Ralph Caputo, Claimant and Director, Office of Workers'
Compensation Programs, United States
Department of Labor,
Respondents.

Docket No. 76-4043

Pittston Stevedoring Corporation,
Petitioner,

v.

John Scaffidi,
Respondent.

Docket No. 75-4249

Carmelo Blundo,
Claimant-Respondent,

v.

International Terminal Operating Company, Inc.,
Self-Insured Employer-Petitioner,

Director, Office of Workers' Compensation Programs,
United States Department of Labor,
Respondent.

Before Lumbard, Friendly and Oakes, Circuit Judges.

Petition to review four orders of the Benefits Review Board granting awards under the Longshoremen's and Harbor Workers' Compensation Act. One petition is dismissed as untimely and a second as having been mooted by payment of the award by the insurance carrier; the other two awards are affirmed.

* * *

Friendly, Circuit Judge:

We have here four petitions under 33 U.S.C. § 921(c) by employers, in some instances joined by their insurance carriers, to review orders of the Benefits Review Board (BRB) affirming compensation awards made to four employees under the Longshoremen's and Harbor Workers' Compensation Act (LHWCA), as amended in 1972, 33 U.S.C. §§ 901 et seq.[1] They present a question of considerable importance, namely, how far the 1972 Amendments extended the coverage of LHWCA.

[1] The Benefits Review Board was created by the 1972 Amendments to the LHWCA as an independent, "quasi-judicial" body within the Department of Labor. 33 U.S.C. § 921(b)(1); 20 C.P.R. § 801.103 (1975). Its three members are appointed by the Secretary of Labor, and it is "authorized to hear and determine appeals raising a substantial question of law or fact taken by any party in interest from decisions with respect to claims of employees under this chapter," made by the administrative law judges who hear LHWCA claims in the first instance. 33 U.S.C. §§ 919(d), 921(b)(1) and (3) (as amended). Prior to the 1972 amendments, there was no administrative review procedure for LHWCA claims; cases were heard in the first instance by Deputy Commissioners and review was then had in the United States district courts. 33 U.S.C. § 921 (1970). Under the 1972 amendments cases are heard by an administrative law judge whose decisions are reviewed by the BRB, and appeals lie to the court of appeals directly from final orders of the BRB. 33 U.S.C. § 921(c).

Presented with the same general issue, a divided panel of the Fourth Circuit ruled in favor of the employers. *I.T.O. Corporation of Baltimore* v. *Benefits Review Board, U.S. Dep't of Labor and Adkins,* 529 F.2d 1080 (1975), holding that the Act extended benefits only to persons injured while unloading cargo from the ship to what the majority termed a "first point of rest," i.e., the first place where the cargo is deposited on a pier or terminal area after being unloaded, and to persons injured while loading cargo from the "last point of rest," 529 F.2d at 1081. The *I.T.O.* case has been reheard *en banc.* We are told that only one other circuit has construed the extended coverage provisions here at issue, *Weyerhaeuser Co.* v. *Gilmore,* 528 F.2d 957 (9 Cir. 1975), rehearing denied, Feb. 6, 1976, petition for cert. filed, No. 75-1620, 44 U.S.L.W. 3645 (U.S. May 6, 1976), a case we do not consider to be truly relevant, but that the issue here presented is *sub judice* in the First Circuit, *John T. Clark & Son of Boston, Inc.* v. *William Stockman,* No. 75-1360, argued Jan. 5, 1976, and in the Fifth Circuit. Given the importance of the question, the number of courts of appeals endeavoring to find an answer, and the divergence of opinion already manifested, it seems unlikely that the opinion of any court of appeals will be the last word to be said. In consequence we shall not dwell on the long history of the problem of affording appropriate remedies for longshoremen and harbor workers against their employers which had its inception in *Southern Pacific Co.* v. *Jensen,* 244 U.S. 205 (1917)—a history which is interestingly traced in Gilmore & Black, The Law of Admiralty §§ 6-45 to -49 (2d ed. 1975)—but will proceed directly to the cases in hand.

I. *The 1972 Amendments*

The situation that led to adoption of the 1972 Amendments was described as follows in the portion of the Senate

Report headed "Need for the Bill," S. Rep. No. 92-1125, 92d Cong., 2d Sess. 4-5 (1972):

> Since 1946, due to a number of decisions by the U.S. Supreme Court, it has been possible for an injured longshoreman to avail himself of the benefits of the Longshoremen's and Harbor Workers' Compensation Act and to sue the owner of the ship on which he was working for damages as a result of his injury. The Supreme Court has ruled that such ship owner, under the doctrine of seaworthiness, was liable for damages caused by any injury regardless of fault. In addition, shipping companies generally have succeeded in recovering the damages for which they are held liable to injured longshoremen from the stevedore on theories of express or implied warranty, thereby transferring their liability to the stevedore company, the actual employer of the longshoremen.
>
> The social costs of these laws suits, the delays, crowding of court calendars and the need to pay for lawyers' services have seldom resulted in a real increase in actual benefits for injured workers.
>
> For a number of years representatives of the employees have attempted to have the benefit levels under the Act raised so that injured workers would be properly protected by the Act. At the same time, employer groups indicated their willingness to increase such payments but indicated they could do so only if the Longshoremen's and Harbor Workers' Compensation Act were to again become the exclusive remedy against the stevedore as had been intended since its passage in 1927 until modified by various Supreme Court decisions.

> The bill reported by the committee meets these objections by specifically eliminating suits against vessels brought for injuries to longshoremen under the doctrine of seaworthiness and outlawing indemnification actions and "hold harmless" or indemnity agreements. It continues to allow suits against vessels or other third parties for negligence. At the same time it raises benefits to a level commensurate with present day salaries and with the needs of injured workers whose sole support will be payments under the Act.

In practical terms the bill was a trade-off. See *Landon* v. *Lief Hoegh and Co., Inc.*, 521 F.2d 756, 761-62 (2 Cir. 1975), cert. denied, 96 S.Ct. 783 (1976). Stevedores and other employers were pushing for complete abolition of the three-way damage action possible under *Seas Shipping Co.. Inc.* v. *Sieracki,* 328 U.S. 85 (1946), which held longshoremen and other harbor workers to be "seamen" entitled to sue the ship for unseaworthiness, and *Ryan Stevedoring Co., Inc.* v. *Pan-Atlantic S.S. Corp.,* 350 U.S. 124 (1956), which permitted the shipowner to seek indemnity for any liability thus entailed from an injured worker's employer. This triangle in effect exposed the employer (already liable for and often having paid the limited benefits provided by the LHWCA) to an unlimited liability to the employee for damages and to the shipowner for its counsel fees in defending the employee's suit. The unions representing longshoremen and other harbor workers, which for years had been seeking increased benefits under the Act, opposed Congressional repeal of their *Sieracki*-created status as "seamen" in part on the grounds that the LHWCA's benefits were so low that workers needed the additional protection of the "unseaworthiness" doctrine. The compromise between these positions effected by the 1972 Amendments

was this: The *Sieracki* action for unseaworthiness was eliminated, longshoremen in the future could sue the ship only for negligence, and employers were immunized from indemnity suits by shipowners. 33 U.S.C. § 905(b). In return, the workers were to secure increased benefits under LHWCA and, what is here pertinent, an extension of that statute's coverage. Thus the Senate Committee said that the principal purpose of the Amendments was "to upgrade the benefits, extend coverage to protect additional workers, provide a specified cause of action for damages against third parties, and to promulgate administrative reforms," Sen. Rep., *supra,* p. 1.

The change in the coverage section was dramatic. Before amendment the first sentence of 31 U.S.C. § 903(a) read:

> Compensation shall be payable under this chapter in respect of disability or death of an employee, but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any dry dock) and if recovery for the disability or death through workmen's compensation proceedings may not validly be provided by State law.

The Amendments altered this to read:

> Compensation shall be payable under this chapter in respect of disability or death of an employee but only if the disability or death results from an injury occurring upon the navigable waters of the United States (including any adjoining pier, wharf, dry dock, terminal, building way, marine railway. or other adjoining area customarily used by an employer in loading, unloading, repairing, or building a vessel).

In place of the definition of "employee" previously contained in § 902(3) as "not includ[ing] a master or member of a crew of any vessel, nor any person engaged by the master to load or unload or repair any small vessel under eighteen tons net," the Amendments defined the term as follows:

> The term "employee" means any person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations, and any harborworker including a ship repairman, shipbuilder, and shipbreaker, but such term does not include a master or member of a crew of any vessel, or any person engaged by the master to load or unload or repair any small vessel under eighteen tons net.

The definition of "employer," § 902(4)

> (4) The term "employer" means an employer any of whose employees are employed in maritime employment, in whole or in part, upon the navigable waters of the United States (including any dry dock).

was modified by inserting after "navigable waters of the United States" the expansion of that term by the parenthetical phrase in § 903.[2]

Thus, under the Amendments there are two tests for coverage under the Act: a "situs" test requiring the injury to occur on the "navigable waters" as now defined, and a "status" test which requires that the employee be "engaged in maritime employment," etc. While the situs test has been liberalized, the creation of an employee status test adds a

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[2] The significance of this definition is that liability for compensation is predicated on being an "employer," 33 U.S.C. § 904.

new element to the coverage requirements.[3] The problem with which we are here concerned arises from Congress' failure to supply any definition of two terms in § 902(3) —"engaged in maritime employment" and "any longshoreman or other person engaged in longshoring operations."

II. *The Facts*

Two of the cases before us, relating to claimants Blundo and Scaffidi, concern the loading or unloading of containers; the other two, relating to claimants Dellaventura and Caputo, involve loading of ordinary cargo into consignees' trucks on the pier.

(1) *Blundo.* Claimant Blundo was employed as a "checker" by the International Terminal Operating Co. (ITO).[4] He was injured while checking cargo being removed from a container at the 19th Street pier in Brooklyn when he walked around a draft containing cargo to mark it, slipped on some ice and fell. He was working on the stringpiece within 30 to 40 feet of the water. The container he was checking had been unloaded a few days before at a different pier and then taken by a truckman over city streets to the 19th Street pier where it was opened by the United States Customs Office and then stripped. The Administrative Law Judge (ALJ) found that the 19th Street pier was not utilized by the employer for the actual loading or unloading of vessels but rather for the storage of commodities and for

[3] Formerly, if an employee was not expressly excluded, as, e.g., a crew member; his injury occurring upon the navigable waters was compensable under the Act so long as his employer had "any . . . employees . . . employed in maritime employment, in whole or in part. . . ." 33 U.S.C. § 902(4) (1970).

[4] A "checker" checks the contents of a container carrying goods for several consignees against the bills of lading or other records.

the "stripping or stuffing, *i.e.*, loading or unloading of containers." The BRB affirmed his findings as to the employee's status and the situs of the accident and upheld a compensation award under the LHWCA.

(2) *Scaffidi.* Claimant Scaffidi was employed by Pittston Stevedoring Corp. as a "hustler" operator, a kind of trucker who moves containers within a terminal. On March 12, 1973, Scaffidi drove a hustler loaded with containers of cargo from the Columbia Street Pier in Brooklyn, New York, through some ten blocks of public streets to Pier 12. On arriving at Pier 12 he backed the container to a receiving platform on the dock in preparation for loading the container on the ship. When the container was opened, a large case fell out and injured him. The BRB affirmed the findings of the ALJ on the ground that the operator of a hustler used to transport containers within a terminal is engaged in an essential step in the overall process of loading cargo aboard a vessel, which was maritime employment as contemplated in 33 U.S.C. § 902(3). It found that the fact that the container had been transported over public streets was irrelevant.

(3) *Dellaventura.* Claimant Dellaventura, employed by Pittston Stevedoring Corporation as a "sorter," was injured on June 27, 1973 at Pier 20 of the Pouch Terminal on Staten Island while helping to load a truck, belonging to a consignee with coffee bags which had been offloaded from the ship *"CAMPECHE"* on or about February 16, 1973. Dellaventura slipped on some loose coffee beans while inside the truck. At times Dellaventura's responsibilities included going into the holds of ships to assist in sorting and loading or off-loading cargo. The accident occurred about 30 feet from the water's edge on the pier. The record affords no explanation for the consignee's 133-day delay in picking up the bags of coffee beans, but the ALJ found that the pier contained no warehouse facilities. The BRB affirmed his

decision on the grounds set forth in *Avvento* v. *Hellenic Lines,* BRB No. 74-153, 1 BRBS 174, 1975 A.M.C. 153 (Nov. 12, 1974), which held that " 'until cargo is delivered to a trucker or other carrier who is to pick it up for further trans-shipment, such cargo is in maritime commerce and all employees engaged in its movement to that point are engaged in maritime employment.' "

(4) *Caputo.* Claimant Caputo was usually employed as "terminal labor" by Pittston Stevedoring Corp. When there was no work available at Pittston, he would take a "shape up" job as a longshoreman wherever it was available and on the day of the accident was working for Northeast Marine Terminal Co., Inc. at their terminal adjoining the water in Brooklyn. He was injured while helping a cargo consignee's truckdriver load boxes of cheese, discharged from a vessel at least five days previously, inside the consignee's truck; the injury occurred while he was rolling a dolly loaded with the cheese on it into the truck. Caputo and the employer stipulated that the work he was doing when injured involved the same risk as would obtain wherever and by whomsoever trucks were loaded or unloaded with dollies. But the ALJ found the stipulation lacked significance "in view of the situs where the injury actually occurred." The ALJ made an award in his favor and the BRB concurred.

III. *Motion to Dismiss Petitions in Dellaventura's Case as Untimely.*

Dellaventura and the Director, Office of Worker's Compensation Programs, U.S. Dept. of Labor (OWCP), by his attorney, the Solicitor of Labor, have moved to dismiss the petitions of the employer. Pittston Stevedoring Corp., and its insurance carrier, The Home Insurance Co., as untimely. We grant Dellaventura's motion, thereby rendering it un-

necessary to decide whether the Solicitor of Labor was entitled to make one.[5]

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[5] In the cases of Blundo and Caputo, petitioners named as a respondent the Director, Office of Workers' Compensation Programs in the Department of Labor; the petitions in Dellaventura's and Scaffidi's cases did not. The Director moved to amend the captions in the Dellaventura case, apparently for the primary purpose of enabling him to make the motion to dismiss; he made no similar motion to amend the caption in Scaffidi's case.

The issue whether the BRB should be a respondent in court of appeals review of its awards under 33 U.S.C. § 921(c) was treated in *McCord* v. *Benefits Review Board,* 514 F.2d 198 (D.C. Cir. 1975). There the BRB moved to dismiss the petition as to it. Petitioner did not oppose the motion and the court granted it, citing recent unreported decisions of the Ninth Circuit. The court reasoned that there was "sufficient adversity" between the claimant and the employer (or its insurance carrier) "to insure proper litigation without participation by the Board," that requiring the Board to participate "would parallel requiring the District Court to appear and defend its decision upon direct appeal" and that the presence of the second comma in 33 U.S.C. § 921(c) which reads:

> A copy of such petition shall be forthwith transmitted by the clerk of the court, to the Board, and to the other parties, and thereupon the Board shall file in the court the record in the proceedings as provided in section 2112 of Title 28.

indicated an intention that the Board should not be a party to the appeal. There were pending motions to substitute the Director, Office of Workers' Compensation Programs, U.S. Dept. of Labor (OWCP), as a respondent which were not before the court of appeals. In the *I.T.O.* case, *supra,* the Board moved to be dismissed as a respondent and to have the Director substituted; the court granted the first branch of the motion but denied the second, 529 F.2d at 1088-89.

With respect, we cannot subscribe to the view that Congress intended to create what to us would seem a novel form of review of federal administrative action in which no one representing the Government would be a party. See F.R.App.P. 15(a) ("In each case the agency shall be named respondent."). Prior to the 1972 Amendments judicial review took the form of a suit for an injunction in the district court against the deputy commissioner who made the order (former § 921(b)); in the absence of evidence of Congressional intent we find it had to believe that, by providing internal review followed by an appeal to a court of appeals, Congress meant to oust the Government from further participation as of right. Appearance as an *amicus* may not be good enough, since it normally does not allow oral argument and never allows an appeal.

Neither the *McCord* nor the *I.T.O.* court discussed § 921(a) which provides:

> Attorneys appointed by the Secretary shall represent the Secretary, the deputy commissioner, or the Board in any court proceedings under section 921 of this title or other provisions of this chapter except for proceedings in the Supreme Court of the United States.

The existence of sufficient adversity between private parties has not been thought to preclude the Government's right to be a party in many other sorts of review of federal administrative action. The second comma, especially in a sentence with an inappropriate first one, seems a slender reed; the "other parties" phrase means the other parties to the BRB review but does not rule out the BRB's being a party to review in the court of appeals. While Congress did not spell matters out with the same specificity as in 28 U.S.C. § 2348, we think it sufficiently indicated its intention that the BRB and other parties to the proceeding before the BRB should be parties to a review by a court of appeals under 33 U.S.C. § 921(c); if the BRB chooses to leave the defense of its order in a particular case to the prevailing private party, it is free to do so.

The administrative regulations do not specify which branch of the agency should be represented as respondent on appeal. 20 C.F.R. § 801.402 seems to contemplate that the BRB is the proper agency respondent in court of appeals review, since it provides that "except in proceedings in the Supreme Court" the representation of the BRB is provided by the Solicitor of Labor. Moreover, § 921a quoted above seems to contemplate that the BRB be represented in court of appeals review. However, 20 C.F.R. § 801.2(a)(10) defines "party" and "party in interest" to include the "Secretary or his designee. . . ." This would indicate that the Secretary of Labor shall determine what officer represents the agency in the court of appeals. The Government's position has been that the Director, OWCP is the proper respondent. The OWCP is an administrative, not a statutory, creation. See 20 C.F.R. §§ 1.1 et. seq., and § 701.203. And the Solicitor of Labor is authorized to appear and participate on behalf of the Director, OWCP as an interested party before the BRB. 20 C.F.R. § 702.333(b). However, in the section assigning to the OWCP the responsibility for administering various programs, including the LHWCA, the OWCP is given administrative authority "except [for] 921 as it applies to the Benefits Review Board . . . ." 20 C.F.R. § 1.2(d).

Trying to make sense out of these regulations, we think that while the Director, OWCP is a proper party before the ALJ or the BRB, see cases discussed in 3 *Larson, Workmen's Compensation Laws* § 83.19, at n. 49.1 (1976 ed.), the BRB is the proper agency respondent for review in the court of appeals, although the Solicitor of Labor could be designated to represent it. We deem it best to defer resolution of this question to a case where decision on this point is essential; perhaps in the meanwhile the Department will tidy up its regulations.

The statute, 33 U.S.C. § 921(c), provides that a person adversely affected or aggrieved by a final order of the BRB may obtain review by the court of appeals for the circuit where the injury occurred by filing in such court within sixty days following the issuance of such Board order a written petition praying that the order be modified or set aside." The BRB's order was issued on October 9, 1975, but the petition for review was not filed until February 5, 1976.

Petitioners' basis for resisting the motion is as follows: The BRB's Rules and Regulations, 20 C.F.R. § 802.403(b), provide that the original of any BRB decision shall be filed with the Clerk of the Board, which was done here, and that "[a] copy of the Board's decision shall be sent by certified mail or served personally on all parties to the appeal and the Director." The rule does not say when this should be done. Apparently no such notice was sent to the employer or the insurance carrier but the attorney who represented both parties before the BRB and in this court acknowledges that he received a copy within the 60-day period and does not deny that he advised his clients.

Like 28 U.S.C. § 2344 and similar provisions in the statutes for the review of orders of other agencies, 33 U.S.C. § 921(c) makes the time for seeking review start to run from the entry of the agency's order, even though the agency is under a duty to give notice. See *Willow Crossing Dairy Farm* v. *Hardin*, 327 F.Supp. 798 (W.D. Pa. 1970) (where review section of Agricultural Adjustment Act provided for filing of review petition within 20 days of "entry" of judgment, word "entry" is to be interpreted normally and petition filed September 28 to review order of September 2 was not timely and did not vest the court with jurisdiction even though counsel for plaintiff did not receive notice of ruling until September 8). The BRB's regulations count the 60-day period from the date on which the decision is

"filed," 20 C.F.R. § 802.410.[6] In the parallel situation of review of judgments of district courts in civil cases Rule 4(a) of the Federal Rules of Appellate Procedure likewise makes the entry of judgment the critical date; F.R.Civ.P. 77(d) directs the clerk to serve notice of the entry of a judgment or order but expressly provides that "[l]ack of notice of the entry by the clerk does not affect the time to appeal or relieve or authorize the court to relieve a party for failure to appeal within the time allowed, except as permitted in Rule 4(a) of the Federal Rules of Appellate Procedure," namely, "upon a showing of excusable neglect."

We see no reason not to read 33 U.S.C. § 921(c) as meaning what it says. Cf. *United States* v. *Michel,* 282 U.S. 656 (1931); *American Construction Co.* v. *United States,* 107 F.Supp. 858 (Ct. Cl. 1952), *cert. denied.* 345 U.S. 922 (1953). The policy requiring that appeals be timely taken is so strong that ministerial failures by a clerk cannot be allowed to overcome it. The Act, like many administrative review statutes, does not seem even to encompass the "excusable neglect" escape hatch provided for untimely appeals from the district courts. But even if it should be construed as doing so, this would be a most inappropriate case for granting relief. The clerk made the pardonable error of notifying the attorney rather than the parties, exactly what a clerk

[6] In the only case construing the statutory provisions for mail notice to the parties of the Deputy Commissioner's decision under the old act, 33 U.S.C. § 919, the Deputy Commissioner's first order was apparently neither filed in his office nor mailed to the parties. The court held, in response to the employer's argument that a second, more generous award was barred by the first award, that the first order "did not take on the dignity of an effective award." *American Mutual Liability Ins. Co. of Boston* v. *Lowe,* 13 F. Supp. 906, 907 (D.N.J.) *aff'd,* 85 F.2d 625 (3 Cir. 1936). We believe this case to be wholly distinguishable particularly since both opinions rest primarily on the failure to file a *signed* order. 13 F. Supp. at 907 (citing *Howard* v. *Monahan,* 33 F.2d 220 (S.D. Tex. 1929)).

of a district court is directed to do, F.R.Civ.P. 5(b) and 77(d), and the attorney offers no explanation for having failed to file the petition within the allotted time.

IV. *Motion to Dismiss Petition in Scaffidi's Case As Not Presenting a Justiciable Controversy.*

In the proceedings up through the decision of the ALJ, the caption of this case named both Pittston and Gulf Insurance Company, its insurance carrier, as respondents; both were represented by the same attorney. After the ALJ's decision the insurance carrier paid the award and chose not to contest it further. Pittston then engaged its present attorney who altered the caption. Apparently the claimant made no point before the BRB that the carrier's payment of the award mooted the case; he does now. Despite the general rule that objections not raised before an administrative body cannot be raised on review, we must consider this one since it goes to our jurisdiction.

We see no basis on which a reversal of the BRB's decision would enable the insurance carrier to recover from Scaffidi a payment the liability for which it chose not to contest, and Pittston, which was invited to file a reply brief on the issue, does not suggest one. Cf. *Federal Insurance Co.* v. *Detroit Fire & Marine Insurance Co.,* 202 F. 645 (6 Cir.), *cert. denied,* 229 U.S. 620 (1913) (insurer which paid its share of loss and failed to join other subrogated insurers in third party suit held entitled to recover ratable share of damages won). Pittston claims instead that it is nonetheless a "person adversely affected or aggrieved" by the BRB's order, 33 U.S.C. § 921(c), since the award will adversely affect its experience rating and thus increase its future premiums. Cf. *Travelers Insurance Co.* v. *Belair,* 284 F. Supp. 168 (D. Mass. 1968).

Pittston's contetnion that this interest affords it standing immediately encounters *Gange Lumber Co.* v. *Rowley,* 326 U.S. 295 (1945). The Court there held that the appellant-employer had failed to make a showing of substantial injury to any legally protected interest which would entitle it to question the validity under the due process clause of a state statute retroactively extending the time period in which workmen's compensation awards could be modified. Under the state's system, all awards were paid out of a state insurance fund supported by employer contributions of "premiums." Rejecting the employer's argument that its future premium rates would be adversely affected by the increased award, the Court held that the effect of any one accident was too minimal and its possible injury to the employer too speculative to establish the justiciability of the case.[7]

The *Gange* decision, however, has been severely criticized by Professor Davis. He notes that under the state statute the employer was permitted to appeal, and characterizes the result as "unique," "the extreme one of denying the employer's standing even though the statute conferred such standing." 3 *Davis, Administrative Law Treatise* § 22.13, n.4 (1958). It may well be that under the more liberal concepts of standing developed in such cases as *Ass'n of Data Processing Service Organizations, Inc.* v. *Camp,* 397 U.S. 150 (1970), and *Barlow* v. *Collins,* 397 U.S. 159 (1970), *Gange Lumber Co.* would not be followed. However, even on the standing issue alone, an overruling of *Gange Lumber*

[7] *Gange Lumber Co.* was followed in *Railway Express Agency* v. *Kennedy,* 189 F.2d 801 (7 Cir.), *cert. denied,* 342 U.S. 830 (1951) (denying employer standing to challenge unemployment compensation payments to striking workers from federal fund). Cf. 2A *Lawson, Workmen's Compensation Law* § 77.30 (1976 ed.) (damage action by employer against negligent third party for increased premiums would lie).

Co. would hardly carry the day for Pittston on this record where it has submitted nothing but conclusory assertions of adverse effect on future premiums.[8]

However all this may be, the liberalization of notions as to what makes a person "adversely affected or aggrieved" does not eliminate the requirement that in order for a controversy to be justiciable, the court must be able to afford effective relief. See *Simon* v. *Eastern Kentucky Welfare Rights Org.,* ..... U.S. ....., 44 U.S.L.W. 4724 (June 1, 1976); *Warth* v. *Seldin,* 422 U.S. 490, 504-05 (1975); *North Carolina* v. *Rice,* 404 U.S. 244, 246 (1971); *Local No. 8-6, Oil, Chemical & Atomic Workers Internat'l Union, AFL-CIO* v. *Missouri,* 361 U.S. 363, 367 (1960); *St. Pierre* v. *United States,* 319 U.S. 41, 42 (1943); *McKee* v. *Turner,* 491 F.2d 1106 (9 Cir. 1974). As indicated, Pittston has not claimed that Scaffidi will not retain his award even if we should reverse the BRB; what it is asking is simply an advisory opinion that the award should not have been made.[9] We do not doubt that where insurance only partially

[8] There is no proof that payment of this one award would affect the premiums of such a large employer as Pittston. Moreover, we are not told whether the arrangements between Pittston and its insurance carrier allow the latter to take advantage of an award made without Pittston's consent in determining Pittston's ratings and, if so, whether a reversal by us would change matters.

[9] *Jaabeck* v. *Theodore A. Crane's Sons Co.,* 238 N.Y. 314, 318 (1924), cited by the petitioner in its reply brief, is wholly inapposite. A state workmen's compensation board had entered an award against both the employer and its insurer, one of the questions determined by the board being that of the insurer's liability under the insurance contract. The Appellate Division affirmed the award as to the employer but reversed as to the insurer on the ground that the policy did not cover the risk. The employer appealed to the Court of Appeals, which reversed the Appellate Division with respect to the insurer, affirming in full the order of the State Industrial Board. The employer was clearly aggrieved by the order of the Appellate Division and the Court of Appeals gave effective relief by reinstating the order of the State Industrial Board.

covers the liabiilty, the employer may appeal from a judgment even though the insurer has paid its part. See *Moore* v. *Columbia Casualty Co.*, 174 F.Supp. 566 (S.D. Ill. 1959); *Queen Ins. Co. of America* v. *Meyer Milling Co.*, 43 F.2d 885 (8 Cir. 1930). But where the issue of liability is determined against an insured and its insurer, and the insurer pays the damages in full even without the consent of the insured and chooses not to appeal, the insured cannot appeal from the judgment against him. *Ross* v. *Stricker*, 153 Ohio St. 153, 91 N.E.2d 18 (1950), discussed in 19 *Couch on Insurance* 2d § 78.228. In short, as the Supreme Court has said, albeit in a different context, once an insurer "has paid an entire loss suffered by the insured, it is the only real party in interest and must sue in its own name." *United States* v. *Aetna Casualty & Surety Co.*, 338 U.S. 366, 380-81 (1949); *Link Aviation, Inc.* v. *Downs*, 325 F.2d 613 (D.C. Cir. 1963). See also *Zauderer* v. *Continental Casualty Co.*, 140 F.2d 211 (2 Cir. 1944). This seems a reasonable application of the general rule that a party who has no interest in a fund cannot appeal from an order disbursing the fund. *Seaboard Surety Co.* v. *United States*, 306 F.2d 855 (9 Cir. 1962), and cases cited at 306 F.2d at 859, n. 6. We therefore dismiss Pittston's petition.[10]

V. *Interpretation of the Statute*

With these preliminaries out of the way, we can now undertake our main task—the interpretation of the coverage clauses of the 1972 Amendments.

[10] An additional reason for this conclusion is that once the insurance carrier has paid, without preserving its right to recover the payment by taking an appeal, the case lacks the necessary quality of adversariness. We see no reason why a person in Scaffidi's position should bother to defend against a petition to review or why the BRB or the Director should spend the Government's resources in such a case, even though that was done here.

Admitting as they must that the Amendments worked some extension of coverage, petitioners and the National Association of Stevelores (NAS), as *amicus curiae*, would limit this to factual situations generally comparable to those in *Nacirema Operating Co., Inc.* v. *Johnson*, 396 U.S. 212 (1969). There the Court held that the Act, as it then stood, did not cover longshoremen killed or injured on a pier while attaching cargo from railroad cars to ships' cranes for removal to the ships, although coverage presumably would have existed had they been hurled into the water, *Marine Stevedoring Corp.* v. *Oosting*, 238 F.Supp. 78 (E.D. Va. 1965), *aff'd*, 398 F.2d 900 (4 Cir. 1968) (en banc),[11] or injured on deck while performing part of the same operation, *Calbeck* v. *Travelers Ins. Co.*, 370 U.S. 114 (1962). Resting its decision solely on statutory grounds, the Court said that "[t]he invitation to move" the line dividing the coverage of LHWCA "landward must be addressed to Congress, not to this Court," 396 U.S. at 224. Petitioners argue that the BRB's rationale in effect reads the "status" requirement out of the Act by affording coverage to any long-

[11] *Nacirema Operating Co., Inc., supra*, reversed the *en banc* decision of the Fourth Circuit in *Marine Stevedoring Corp., supra*. Four cases were before the court of appeals in the consolidated appeal; in only three cases were petitions for *certiorari* filed and granted. Those three cases involved employees injured on the pier as described above whom the Deputy Commissioner had ruled were *not* covered by the LHWCA. The district courts had affirmed the Deputy Commissioners' denial of awards, and were reversed by the Fourth Circuit. In the fourth case (the title case in the court of appeals), the employee, also on the pier, had been injured while lifting a cable off the stern bollard of a vessel when it suddenly straightened, catapulting him into a river where he drowned. The Deputy Commissioner had found that the employee was covered under the Act, his award was affirmed by the district court and by the court of appeals, and it was not before the Supreme Court in *Nacirema*. Mr. Justice Douglas noted in his dissent that "[i]t is incongruous . . . that in an accident on a pier over navigable waters coverage of the Act depends on where the body falls after the accident has happened." 396 U.S. at 225.

shoreman injured on a pier no matter what he is actually doing when injured.

The respondent employees, the International Longshoremen's Association (ILA), as *amicus curiae,* and the Solicitor of Labor (see note 5, *supra*) contend that the extension was much more substantial. Their position is that the process of unloading a vessel continues until the cargo is deposited on the consignee's truck on the pier (or begins, in the case of loading, when the goods are being removed from the delivery truck), and that anyone physically participating in this process is engaged in "maritime employment." We disagree with petitioners, without having to decide whether we would go to the full extent urged by their adversaries.

A.

We begin our analysis by remarking on the unsatisfactory state of the records before us, even if we include for this purpose the two petitions which we have dismissed. When cases of this nature began coming to the BRB shortly after the enactment of the Amendments, it should have realized that it was faced with a major task of statutory construction in determining what constitutes "maritime employment" or being a "longshoreman or other person engaged in longshoring operations"—which task could be performed satisfactorily only in the light of an extensive factual background detailing the structure of work on the various piers of this country. The following are illustrative of facts we would like to know but on which these records shed little or no light, even as regards the port of New York, let alone the rest of the nation. Does one gang normally take cargo off or on the ship while another is responsible for transportation beyond the "point of rest"? Does the same gang always, sometimes, or often perform both jobs? Is all work on the

pier normally conducted by a single employer or is there a division between the stevedore and the "terminal operator"? Even if there is only one employer, does he segregate the employees in their work assignments, by having different collective bargaining agreements or otherwise? Are separate charges made for services beyond the "point of rest" and, if so, for what? Does the "point of rest" shift about on the same pier? Just what is the normal practice for stripping and stuffing containers with goods belonging to different owners or destined to different consignees? Is this work normally done on the pier or in warehouses not adjoining navigable waters? What determines the choices? Does the hazardous nature of the employment stop at the point of rest or continue so long as the cargo is on the pier? Do the hazards change in frequency or degree as the longshoreman moves away from the water? The consolidation of several cases presenting different factual situations in a single large proceeding might have enabled the BRB to make meaningful distinctions. Instead of developing such a record and laying down guidelines for the ALJ's, the BRB has handled each case on an individual basis,[12] and without establishing any record support for the interpretive rules announced therein.

If we were sitting as a court of last resort, we would remand these cases to the BRB on our own motion with directions to cause such a hearing to be held. But with the cases in their present posture in this circuit and others. we

[12] We were told at argument that in the *I.T.O.* case the NAS tendered to the BRB a "Brandeis brief" intended to give the BRB some of the general information we have mentioned, outlining the division of labor in 45 ports in the United States; that the tender was rejected on the objection of the Solicitor on behalf of the Director, OWCP; but that the document was discussed at oral argument in the Fourth Circuit and has been referred to in other decisions of the BRB. We have not had even that much assistance.

think it more helpful for us to state our views on what is now before us.[13]

B.

Perhaps the most useful way to approach the issue is to begin by discussing certain arguments we have not found to be particularly helpful.

(1) *The "presumption" of coverage, 33 U.S.C. § 920.* The claimants, the Solicitor of Labor, and the ILA place great reliance on a provision in the LHWCA as originally adopted in 1927, 33 U.S.C. § 920, and still in effect, that four things shall be presumed in the absence of substantial evidence to the contrary. One of these is "[t]hat the claim comes within the provisions of this chapter." 33 U.S.C. § 920(a). They contend that if the meaning of the new coverage provision, 33 U.S.C. § 903, is in any way doubtful, this presumption requires the doubt to be resolved in favor of coverage. We do not think this was what Congress had in mind; the very fact that the presumption can be overcome by substanial contrary evidence indicates its inapplicability to an interpretive question of general import such as this. See *Crowell* v. *Benson,* 285 U.S. 22, 64-65 (1932).

Even in cases holding that the accordion-like phrase "arising out of and in the course of employment," 33 U.S.C. § 920(2), could be widely stretched, the Court has done little more than mention the presumption, *Cardillo* v. *Liberty Mutual Ins. Co.,* 330 U.S. 469, 474 (1947); *O'Keeffe* v. *Smith, Hinchman & Grylis Associates, Inc.,* 380 U.S. 359, 361 (1965) (per curiam), resting its decision mainly on

[13] If one or more of the other circuits seized of this problem should order such a remand, we would entertain a petition for rehearing to enable us to do the same.

the principle with respect to the scope of review discussed below. In *O'Leary* v. *Brown-Pacific Maxon, Inc.,* 340 U.S. 504 (1951), the Court did not rely on the presumption at all, even in the face of a strong dissent. The Court's decisions dealing with questions of coverage of the sort presented here will be searched in vain for any mention of the presumption, see, e.g., *Parker* v. *Motor Boat Sales, Inc.,* 314 U.S. 244 (1941); *Norton* v. *Warner Co.,* 321 U.S. 565 (1944); *Calbeck* v. *Travelers Ins. Co., supra,* 370 U.S. 114 (1962); *Nacirema Operating Co., Inc.* v. *Johnson, supra,* 396 U.S. 224 (1969),[14] although in *Norton* and *Nacirema* coverage was rejected. The cases in this court, *Michigan Mutual Liability Co.* v. *Arrien,* 344 F.2d 640, 645-46 (2 Cir.), *cert. denied,* 382 U.S. 835 (1965), and *Overseas African Construction Corp.* v. *McMullen,* 500 F.2d 1291, 1296 (2 Cir. 1974), likewise treat the presumption as merely an embodiment of the "rule . . . that so long as any reasonable inference from the facts supports jurisdiction under the statutory presumption that jurisdiction may be found." 500 F.2d at 1296. Here the question is not whether a line established by Congress is sufficiently elastic to include the claimant; the main issue is whether Congress placed the line at the "point of rest" or much further landward. Only if we have made the latter basic decision might the presumption come into play in ruling on cases near the border. See *Davis* v. *Department of Labor,* 317 U.S. 249 (1942).

(2) *"Deference" to the BRB.* We likewise see no merit in

[14] In *Davis* v. *Department of Labor,* 317 U.S. 249, 256 (1942), the Court noted that with respect to the largely "factual questions" relating to whether an employee injured within the "twilight zone" of federal jurisdiction established by the Court should be compensated under state or federal law, "presumptive weight" should be given to the findings of the federal or state administrator of the respective program, and relied in part on § 920(a).

the contention of claimants and the Solicitor of Labor that we are confined in our decision because of the deference owed to the BRB. We agree that the standard of review we must apply is that factual findings of the BRB are conclusive if supported by substantial evidence in the record considered as a whole since, as held in *Potenza* v. *United Terminals, Inc.*, 524 F.2d 1136 (2 Cir. 1975), it is of no moment that 33 U.S.C. § 921(b)(3) while applying this standard to the BRB's review of the ALJ's findings of fact does not expressly extend it to review in the court of appeals. But we are still confronted with the ever troubling question whether the determination at issue, namely, whether the 1972 Amendments should be so interpreted as to include these claimants. is the kind of question which justifies or requires judicial deference.

We think it is time to recognize, in line with Professor Kenneth Culp Davis' brilliant discussion, 4 Administrative Law Treatise §§ 30.01-.09 and the corresponding sections in the 1970 Supplement, that there are two lines of Supreme Court decisions on this subject which are analytically in conflict, with the result that a court of appeals must choose the one it deems more appropriate for case at hand.[15] Leading cases supporting the view that great deference must

[15] Our discussion of the Court's ambivalence with respect to deference is not to be read as dealing with two problems quite different from that here presented. One concerns an agency's exercise of power to formulate substantive rules, where the scope is wide, see, e.g., *American Telephone & Telegraph Co.* v. *United States*, 299 U.S. 232 (1936); *Addison* v. *Holly Hill Fruit Products, Inc.*, 322 U.S. 607 (1944), and the rules once issued, even if only in the form of guidelines, are "entitled to great deference," *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 433-34 (1971); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 430-36 (1975). The other concerns an agency's construction of its own rules, see, e.g., *Bowles* v. *Seminole Rock & Sand Co.*, 325 U.S. 410, 413-14 (1945); *Udall* v. *Tallman*, 380 U.S. 1, 16-17 (1965); *TSC Industries, Inc.* v. *Northway, Inc.*, ... U.S. :....., ... n.10 (1976), 44 L.W. 4852, 4855 n.10 (1976).

be given to the decisions of an administrative agency applying a statute to the facts and that such decisions can be reversed only if without rational basis are *Rochester Telephone Corp.* v. *United States*, 307 U.S. 125, 146 (1939); *Gray* v. *Powell*, 314 U.S. 402, 411-12 (1941); and *NLRB* v. *Hearst Publications, Inc.*, 322 U.S. 111, 130-31 (1944). The rationale of these decisions was applied in the three "arising out of and in the course of employment" Supreme Court cases under the LHWCA—*Cardillo, O'Leary* and *O'Keeffe*, cited above. Indeed, the Court seems to have rejected the findings of the LHWCA's Deputy Commissioners only once since the statute was enacted, *Norton* v. *Warner Co., supra*, 321 U.S. 565. However, there is an impressive body of law sanctioning free substitution of judicial for administrative judgment when the question involves the meaning of a statutory term. Illustrative cases are *Office Employees International Union, Local No. 11, AFL-CIO* v. *NLRB*, 353 U.S. 313 (1957), and *Davies Warehouse Co.* v. *Bowles*, 321 U.S. 144, 150 (1944). In one of its most recent decisions on the subject, *Morton* v. *Ruiz*, 415 U.S. 199, 237 (1974), the Court held that "In order for an agency interpretation to be granted deference, it must be consistent with the congressional purpose"; this very nearly eliminates the "deference" principle as regards statutory construction altogether since if the agency's determination is found by a court to be consistent with the congressional purpose, it presumably would be affirmed on that ground without any need for deference.

There are several other reasons not to rest decision on the "deference" approach in these cases. One is that unlike the F.C.C. in the *Rochester Telephone* case, the Bituminous Coal Division of the Department of the Interior in *Gray* v. *Powell*, or the NLRB in the *Hearst* case, the BRB is not a

policy making but entirely an umpiring agency. When Congress has charged an agency with the duty to make and implement a national policy, it is more likely that Congress intended the agency to have some flexibility, free from judicial intrusion, in interpreting the Congressional grant. Compare *Rochester Telephone Corp.* v. *United States, supra,* 307 U.S. at 146; Permian Basin Area Rate Cases. 390 U.S. 747, 767 (1968). A second factor is the way in which the agency has gone about its job. As suggested above, we would be much more inclined to defer to a considered judgment of the BRB rendered on a full record than to this series of short opinions on isolated facts which contain no in-depth study of the problem. A somewhat related point is that although the BRB's decisions have been "consistent and contemporaneous," the issue arose almost immediately after the 1972 Amendments became effective at a time when the BRB had little experience in the administration of the Act; yet its initial decisions, surely not the result of any great expertise, became the basis for all the others. "[A]n agency may not bootstrap itself into an area in which it has no jurisdiction by repeatedly violating its statutory mandate." *FMC* v. *Seatrain Lines, Inc.,* 411 U.S. 726, 745 (1973). Finally, this is a case where understanding of the statute depends in no small measure on prior judicial decisions and legislative history—subjects on which a court has a greater competence than the BRB. We therefore reject the argument that the BRB's decisions in these cases must be affirmed if they are rational but wrong.

(3) *Other definitions.* We likewise give little weight to arguments made on both sides which are based on definitions of "longshoreman" or maritime employment or contracts formulated in different contexts and for different purposes. The ILA relies on Congress' approval, Act of

Aug. 12, 1953, ch. 407, 67 Stat. 541, of definitions (reproduced in the margin)[16] in a compact between New York and New Jersey creating the bi-state Waterfront Commission. To assume that the 1972 Congress had in mind this action of its predecessor of 1953 is to attribute a degree of acumen few Congressmen would claim. Beyond that, the purposes of the two enactments were quite different; it is for that reason that paragraph (1) of the Waterfront Commission Act includes persons, notably clerical workers, clearly not embraced under the most liberal construction of the 1972 Amendments.

On the other hand, a narrow definition of "longshoring

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[16] See ILA Amicus brief at 5-6 n.1. The definitions in the Bi-State Compact can be found at § 9806 of McKinney's Unconsolidated New York Laws and § 32:23-6 of N.J.S.A.

> "Pier" shall include any wharf, pier, dock or quay.
>
> "Other waterfront terminal" shall include any warehouse, depot or other terminal (other than a pier) which is located within one thousand yards of any pier in the Port of New York district and which is used for waterborne freight in whole or substantial part.
>
> "Longshoreman" shall mean a natural person, other than a hiring agent, who is employed for work at a pier or other waterfront terminal, either by a carrier of freight by water or by a stevedore
>
> (a) physically to move waterborne freight on vessels berthed at piers, on piers or at other waterfront terminals, or
>
> (b) to engage in direct and immediate checking of any such freight or of the custodial accounting therefor or in the recording or tabulation of the hours worked at piers or other waterfront terminals by natural persons employed by carriers of freight by water or stevedores . . . .
>
> "Stevedore" shall mean a contractor (not including an employee) engaged for compensation pursuant to a contract or arrangement with a carrier of freight by water, in moving waterborne freight carried or consigned for carriage by such carrier on vessels of such carrier berthed at piers, on piers at which such vessels are berthed or at other waterfront terminals.

operations"[17] formulated by the Secretary of Labor in 1960 as part of safety regulations issued in respect of "all employments covered by this chapter," 33 U.S.C. § 941(a), is likewise not dispositive of the meaning of the words used in the Amendments since under the old statute covered employment was limited to injuries occurring "upon the navigable waters of the United States (including [only] any dry-dock)." And despite the definition of "carriage of goods" as covering "the period from the time when the goods are loaded on to the time when they are discharged from the ship" contained in the Carriage of Goods by Sea Act (COGSA), 46 U.S.C. § 1301(e), we have held that the contract of carriage, obviously a maritime contract, persists after unloading and that the carrier remains liable, not as a carrier but as a bailee, until it delivers the cargo to the consignee or places it in a public dock or warehouse. *David Crystal, Inc.* v. *Cunard Steamship Co.*, 339 F.2d 295, 298 (2 Cir. 1964), *cert. denied*, 380 U.S. 976 (1965); *Leather's Best, Inc.* v. *S.S. Mormaclynx*, 451 F.2d 800, 811-12 (2 Cir. 1971); *Cameco, Inc.* v. *S.S. American Legion Lines*, 514 F.2d 1291, 1295-96 (2 Cir. 1974).

(4) *Liberal construction of remedial legislation.* There is more force in the contention of the claimants and the Solicitor than a broad reading of the 1972 Amendments is required by the oft-iterated principle that remedial legislation should be construed liberally. The Supreme Court said. as to this very statute, although in a quite different context, *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953):

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[17] * * * the loading, unloading, moving or handling of cargo, ships stores, gear, etc., into, in, on, or out of any vessel on the navigable waters of the United States.

25 Fed. Req. 1566 (1960), 29 C.F.R. 9.3(i).

> This Act must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.

Petitioners do not altogether overcome this point by arguing that a statute must be construed with reference to the mischief intended to be overcome, see *Heydon's Case*, 3 Co. Rep. 7a, 76 Eng. Rep. 637 (1584), and that all that Congress intended to "remedy" was the unjust result of *Nacirema Operating Co.* v. *Johnson, supra*, 396 U.S. 212, by accepting the invitation which, pursuant to Mr. Justice White's suggestion, the unions extended to it.[18] The statutory language can fairly be read to do more than that and thus the liberality principle tends in favor of such a reading.

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[18] The Argument, in fact, flounders on a number of points. The invitation issued in *Nacirema* was broadly phrased:

> There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship. But even construing the Extension Act to amend the Longshoremen's Act would not effect this result, since longshoremen injured on a pier by pier-based equipment would still remain outside the Act. And construing the Longshoremen's Act to coincide with the limits of admiralty jurisdiction—whatever they may be and however they may change—simply replaces one line with another whose uncertain contours can only perpetuate on the landward side of the *Jensen* line, the same confusion that previously existed on the seaward side. While we have no doubt that Congress had the power to choose either of these paths in defining the coverage of its compensation remedy, the plain fact is that it chose instead the line in *Jensen* separating water from land at the edge of the pier. The invitation to move that line landward must be addressed to Congress, not to this Court.

396 U.S. at 223-24. The Court contemplated at least two possibilities: an extension of the LHWCA to cover longshoremen injured on a pier "while loading or unloading a ship," or an extension to "coincide with the limits of admiralty jurisdiction." In the absence of clarifying legislative history, we would have no idea which set of evils referred to in *Nacirema* Congress was endeavoring to overcome.

C.

With this background we address ourselves, at long last, to the words of the statute with the aid of the legislative history. There is no question that claimants met the situs test of § 903(a),[19] and concededly all worked for covered "employers" under the Act; the question is whether each—now Blundo and Caputo—was a "person engaged in maritime employment, including any longshoreman or other person engaged in longshoring operations . . . ." § 902(3).[20]

If there were any doubt on the face of the statute, the legislative history makes clear that § 902(3), as here relevant, is to be construed no differently than if it said "any

[19] In the Blundo case the petitioner, I.T.O. makes a halfhearted argument that Blundo was not injured on the navigable waters within the expanded definition because the 19th Street pier on which he was injured was not used for the loading or unloading of vessels. This argument flies in the face of the statute, which reads ". . . including *any* adjoining pier . . . *or other adjoining area* customarily used by an employer in loading, unloading, repairing, or building a vessel." (Emphasis added.) It would seem that any pier next to the water is included within the situs definition. Accord, *I.T.O. Corp. of Baltimore* v. *Adkins, supra,* 529 F.2d at 1083-84. The testimony before the ALJ established that Blundo was injured at one of two "finger" piers which jutted into the water from the terminal. The entire terminal adjoined the water and was enclosed by a single gate. The finger pier at 21st Street was used for vessels; the finger pier at 19th Street was used to load and unload containers. Blundo was clearly on a "pier" and a "terminal" adjoining the water, a part of which was used for loading and unloading vessels. This is sufficient.

[20] Judge Craven, dissenting from the panel opinion in *I.T.O.*, advanced the argument, although he did not base his conclusion on it, that this phrasing might make the inquiry too narrow, since § 902(3) also includes "any harborworker," 529 F.2d at 1090 n.3. He cited the statement in 1 *Norris, The Law of Maritime Personal Injuries* § 3 (3d ed. 1975), that the longshoreman is only "[f]irst in the catalogue of harbor workers." Arguably, however, Congress intended "harbor workers" to refer only to persons similar to those specifically described ("any harborworker including a ship repairman, shipbuilder, and shipbreaker") and not to persons concerned with the movement of cargo. But see Norris, *supra,* § 5. Like Judge Craven we find it unnecessary to decide the point.

longshoreman or other person engaged in longshoring activity or engaged in other maritime employment." Cf. *Argosy Limited* v. *Hennigan,* 404 F.2d 14, 20 (5 Cir. 1968); *United States* v. *Gertz,* 249 F.2d 662, 666 (9 Cir. 1957). The Senate Committee on Labor & Public Welfare stated, Sen. Rep. No. 92-1125, 92d Cong. 2d Sess., at 13:

> It is apparent that if the Federal benefit structure embodied in Comittee bill is enacted, there would be a substantial disparity in benefits payable to a permanently disabled longshoreman, depending on which side of the water's edge the accident occurred, if State laws are permitted to continue to apply to injuries occurring on land. It is also to be noted that with the advent of modern cargo handling techniques, such as containerization and the use of LASH-type vessels, more of the longshoreman's work is performed on land than heretofore.
>
> The Committee believes that the compensation payable to a longshoreman or a ship repairman or builder should not depend on the fortuitous circumstance of whether the injury occurred on land or over water. Accordingly, the bill would amend the Act to provide coverage of longshoremen, harbor workers, ship repairmen, ship builders, shipbreakers, and other employees engaged in maritime employment (exeluding masters and members of the crew of a vessel) if the injury occurred either upon the navigable waters of the United States or any adjoining pier, wharf, dry dock, terminal, building way, marine railway, or other area adjoining such navigable waters customarily used by an employer in loading, unloading, repairing, or building a vessel.

The House Committee Report, No. 92-1441, 92d Cong. 2d Sess. contained identical language.

Secondly, and more important, Congress perceived a need to provide expressly for coverage for "any longshoreman" in addition to what it had established for a person engaged in "longshoring operations." A "longshorman" may thus be covered at some times even when he is not engaged in traditional longshoring activity. This alone is sufficient to condemn the "point of rest" doctrine. Petitioners concede that persons engaged in moving unloaded cargo to its first point of rest or moving cargo to be loaded from its last point of rest are engaged in "longshoring operations." If they alone were to be covered, there was no need to provide also for "any longshoreman."

What then did Congress mean by that phrase? Obviously it is not enough that a claimant calls himself a longshoreman or that a longshoreman's union in a particular port has forced employers to hire its members for such unlongshoreman-like positions as clerks or guards. But see *Weyerhaeuser* v. *Gilmore, supra,* 528 F.2d at 962.

The reports of the Senate and House committees go a long way toward supplying an answer. Immediately after the two paragraphs quoted above came the following:

> The intent of the Committee is to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity. To take a typical example, cargo. whether in break bulk or containerized form, is typically unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters. The employees who perform this work would be covered under the bill for injuries sustained by them over the navigable waters or on the

> adjoining land area. The Committee does not intend to cover employees who are not engaged in loading, unloading, repairing, or building a vessel, just because they are injured in an area adjoining navigable waters used for such activity. Thus, employees whose responsibility is only to pick up stored cargo for further transshipment would not be covered, nor would purely clerical employees whose jobs do not require them to participate in the loading or unloading of cargo. However, checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment. Likewise the Committee has no intention of extending coverage under the Act to individuals who are not employed by a person who is an employer, i.e. a person at least some of whose employees are engaged, in whole or in part in some form of maritime employment. Thus, an individual employed by a person none of whose employees work, in whole or in part, on navigable waters, is not covered even if injured on a pier adjoining navigable waters.

Two conclusions emerge from this with seeming certainty: One is that Congress was concerned about "the advent of modern cargo-handling techniques, such as containerization and the use of LASH-type vessels," new facts of life on the waterfront which, as this court noted in *Intercontinental Container Transport Corp.* v. *New York Shipping Ass'n,* 426 F.2d 884, 886 (2 Cir. 1970), mean that a good deal more of the longshoreman's traditional jobs are now performed on shore. Stripping a container of goods destined to different consignees is the functional equivalent of sorting cargo discharged from a ship; stuffing a container is part of the loading of the ship even though it is performed on shore and not in the ship's cargo holds. Congress intended to

cover men engaged in these activities if they met the situs test contained in the Act—irrespective of the employee's position vis-a-vis a "point of rest." The committees said expressly that "checkers, for example, who are directly involved in the loading or unloading functions are covered by the new amendment." Congress did not say they were covered only if they unloaded the container at the spot where a crane had first deposited the container or loaded it at a place on the water's edge; one of the advantages of containers is that they permit loading or unloading to be done at less congested locations. It sufficed for coverage if an accident arising from the stripping or stuffing of containers occurs at a place within the situs test. One answer to petitioners' argument that stuffing or stripping a container on a pier is no different from doing the same job a mile away is that Congress may have doubted its power, under the admiralty clause of Article III to go further than it did. This would decide Blundo's case if he had been "checking" the container at the pier where it was first deposited even if it had been moved several times. We fail to perceive any significant difference because, for the convenience of someone, it had been moved to another pier. The cargo had not yet been delivered to the consignee; the unloading process still had not been completed.[21]

[21] As many admiralty cases have decided, in construing other doctrines of maritime law, a realistic view of the loading or unloading process recognizes that it does not stop as soon as the cargo first hits the pier on being removed from a vessel, nor does it begin only when the cargo stands on the pier next to the vessel on which it is about to be loaded. See *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 214 at n.14 (1971), *rev'g on other grounds Law* v. *Victory Carriers, Inc.*, 432 F.2d 376 (5 Cir. 1970). Frequently large gangs of longshoremen, dozens of men, are assigned different tasks in a continuous process which moves cargo off a vessel ultimately to a warehouse or storage area at the far end of the pier or terminal. *Garrett* v. *Gutzeit*, 491 F.2d 228 (4 Cir. 1974).

The second conclusion is that Congress was concerned with providing uniformity of coverage for persons engaged in the loading or unloading functions on the piers. It wished to minimize the occasions when longshoremen and other harbor workers would be walking from the liberalized benefits of LHWCA to the much lower ones provided by state compensation laws.[22] Petitioners argue that Congress was concerned with providing uniformity only in the *Nacirema* situation, where the same employee engaged in the same unloading or loading operation would have been protected by the federal statute if a draft of cargo hit him while he was on the ship but not if his injury occurred on the pier itself, and point to the fact that the illustration used by the committees was a case where cargo is "unloaded from the ship and immediately transported to a storage or holding area on the pier, wharf, or terminal adjoining navigable waters." But the committees stated their intention more broadly—"to permit a uniform compensation system to apply to employees who would otherwise be covered by this Act for part of their activity." The concern for uniformity was not limited to rectifying the disparity between the longshoreman making up the draft on the ship and the longshoreman receiving it on the pier; it extended to the disparity that would result if a line were drawn between the latter and a longshoreman, perhaps the very same one, who moved the unloaded cargo to another place on the

[22] Joseph Leonard, Safety Director of the ILA, in speaking to the House Committee about the former coverage provisions, asked, "What do we do, cut ourselves in half?" Hearings on H.R. 247, H.R. 3505, H.R. 12006, and H.R. 15023 (Longshoremen's & Harbor Workers' Compensation Act Amendments of 1972), before the Select Subcomm. on Labor of the House Comm. on Educ. & Labor, 92d Cong., 2d Sess., 297.

pier.[23] The committees' language clearly is broad enough to cover a person like Caputo who spent a significant part of his time in working on vessels, so long as he did not come within the category mentioned as being excluded—employees who are not engaged in loading or unloading a vessel, "[t]hus, employees whose responsibility is only to pick up stored cargo for further trans-shipment."

Petitioner asserts that Caputo came within both descriptions of excluded persons. Clearly he did not come within the second. His responsibility was to perform a variety of jobs on the pier, on both sides of the "point of rest," including going on vessels. Also we would not regard the cargo as "stored" within the committees' meaning simply because the consignee had delayed five days in picking it up.[24] The question whether he was engaged in loading or unloading (here unloading) is closer. If his injury had occurred while he was moving the boxes of cheese from a previous position on the pier to the consignee's trucks, he clearly would have been engaged in "unloading," in the way that term is used in ordinary speech. That being so, it would be wholly artificial to draw a distinction because his injury occurred while he was inside the consignee's truck. See note 21, *supra*. To be sure, the carrier would probably have fulfilled its legal duty if it had instructed the stevedores simply to place cargo alongside consignees' trucks and leave the loading of the trucks to them. But, so far as we can gather from this

[23] Congress also expressed interest in extending federal coverage to as many longshoremen as possible to avoid the "disparity in benefits payable . . . for the same type of injury depending on . . . in which State the accident occurs." Senate Committee Report, *supra*, at 12.

[24] We thus are not required to decide whether cargo should ever be regarded as "stored" so long as it remains on the pier in the custody of the stevedore employed by the vessel rather than being placed in a public warehouse. Dellaventura's case, where there was a delay of 133 days, might have demanded such a decision.

meagre record, that is not the life of the waterfront. The driver needs help in loading or unloading his truck, it would be uneconomical for him to carry a sufficient supply of helpers, everyone wants the truck off the pier as soon as possible, so the stevedores have their employees lend a hand. It is not clear whether an additional charge is collected for this, but we do not think it matters. Neither do we think it matters that the stevedore might not be liable for mishandling by a longshoreman within the truck.

Petitioners make a significant argument that the high benefits under the Amendments were provided because of the extremely hazardous nature of longshoring and that these extraordinary hazards no longer exist once the cargo is beyond the "point of rest." Indeed, in Caputo's case the parties stipulated that what Caputo was doing was the same, and entailed the same risk of injury, as exists wherever and by whomsoever trucks are loaded or unloaded with dollies. The Senate Report, p. 2, refers to "high-risk occupations such as those covered by this Act" and says that "[l]ongshoring, for example, has an injury frequency rate which is well over four times the average for manufacturing operations." What we do not know is what types of operations were considered to be longshoring for the purpose of these calculations. Also, as shown by the case of Blundo, who slipped on ice while he was checking the contents of a container that was being stripped on a pier other than the one where the vessel was unloaded, unusual hazards can exist due to the exposure of piers to the elements which would not exist in a manufacturing plant or in a garage or warehouse where containers removed from trucks were being stripped. Doubtless the hazards of longshoring vary with the particular tasks being performed, and may in some instances be no greater than those encountered by persons doing similar work in places other than piers or terminals

adjoining the water's edge.[25] However all this may be, we find nothing in the words of the statute or its legislative history that would enable us to construct a "hazard" test; Congress' intention was rather to provide uniformity of coverage for workers injured while engaged in the process of loading or unloading ships who met the situs test. We note in this connection that the increased benefits inure to shipbuilders meeting the situs test, although much of their work is performed in facilities no more hazardous than those not within the expanded definition of "navigable waters" and that the benefit schedules of LHWCA apply to all industrial accidents in the District of Columbia, Act of May 17, 1928, ch. 612, 45 Stat. 600 (1928), 36 D.C. Code § 501 (1973).

In a variation of the argument last considered, petitioners contend that because of the higher benefits payable under LHWCA than under state compensation acts, construing the Amendments to apply beyond the point of rest will increase the already high expenses of stevedores to an extent that Congress could not have intended. Clearly, as explained at the outset, the act was a trade-off—a gain to the stevedores in doing away with the *Sieracki-Ryan* triangle, a gain to the workers in higher benefits and in moving the *Jensen* line shoreward. Just how much added cost Congress meant to impose on stevedores by the second part of the bargain is impossible to determine.[26] What is clear is that Congress had

[25] But see the statement of Representative Hicks of Massachusetts on the floor of the House. 118 Cong. Rec. 36387 (Oct. 14, 1972). And see House Hearings, supra note 22, at 288-89 (statement of Patrick Tobin, Internat'l Longshoremen's and Warehousemen's Union (ILWU)).

[26] It is worth noting that the increased benefits provided by the Amendments followed recommendations of the National Commission on State Workmen's Compensation Laws (Sen. Rep., p. 4), and that Congress may well have expected that enactment of the Amendments would have an effect on state compensation laws. Hearings on S. 2318,

a profound distaste for a regime in which employees engaged in the rough and tumble work described in the Amendments should be covered under the Federal Act at one moment and under state acts at another.

We therefore hold that the Amendments at least cover all persons meeting the situs requirements (1) who are engaged in stripping or stuffing containers or (2) are engaged in the handling of cargo up to the point where the consignee has actually begun its movement from the pier (or in the case of loading, from the time when the consignee has stopped his vehicle at the pier), provided in the latter instances that the employee has spent a significant part of his time in the typical longshoring activity of taking cargo on or off a vessel. That is as far as we need to go to affirm Blundo's and Caputo's awards; whether the proviso is essential can be left for another day.

Petitioners say, as indicated above, that in effect our construction reads the status requirement out of the Act. We concede it goes some way in that direction. But it does not do so completely; we part company with Gilmore & Black when they assert that the committee reports should be disregarded and the Amendments then "can fairly be read to cover all employment-related injuries which occur within the Act's territorial limits." The Law of Admiralty, § 6.51 at 430 (1975).[27] We believe our position avoids some of the

S. 525, and S. 1547 (Longshoremen's & Harbor Worker's Compensation Act Amendments of 1972) before the Subcomm. on Labor of the Senate Comm. on Labor & Public Welfare, 92d Cong., 2d Sess., at 74 (statement of James O'Brien, Ass't Dir. Soc'l Sec. Dep't, AFL-CIO), 149 (statement of Joseph Leonard, Safety Director, ILA).

[27] They add that "a female secretary who works in a terminal warehouse should qualify as a LHCA harbor worker in exactly the same way that a female hairdresser in a cruse ship's beauty salon qualifies as a Jones Act seamen." *Id.* We do not find the analogy persuasive. Cruise ships encounter rough weather and may even sink; terminal warehouses don't. Cf. *Malramas* v. *American Export Isbranltaen Lines, Inc.*, 475 F.2d 165 (2 Cir. 1973).

more problematic possibilities lurking in the new "status" requirement, and accords with the liberal interpretation which must be given this remedial statute and its remedial amendments. See Comment, Broadened Coverage Under the LHWCA, 33 La. L. Rev. 683, 693 (1973).

VI. *Constitutionality*

In so construing the Amendments we have necessarily assumed that the construction would be constitutional. We think that assumption is well founded.

It is beyond dispute that "Although containing no express grant of legislative power over the substantive law the provision [of Article III as to admiralty and maritime jurisdiction] was regarded from the beginning as implicitly investing such power in the United States." *Panama R.R. Co.* v. *Johnson*, 264 U.S. 375, 386 (1924). The classic definition of the jurisdiction was Mr. Justice Story's in *DeLovio* v. *Boit*, 7 Fed. Cas. 418, 444, Case No. 3776 (C.C.D. Mass. 1815) that it "comprehends all maritime contracts, torts, and injuries. The latter branch is necessarily bounded by locality, the former extends over all contracts, (whereso-ever they may be made or executed, or whatsoever may be the form of the stipulations) which relate to the navigation, business or commerce of the sea." Mr. Justice Story used the broad term "locality" in his definition of the jurisdiction with respect to "torts, and injuries." Although the Supreme Court later defined locality as including only injuries suffered on navigable waters and not injuries on the land caused by a vessel, *The Plymouth*, 70 U.S. (3 Wall.) 20 (1866), the Court has acquiesced in Congress' overruling that holding by the Admiralty Extension Act, 46 U.S.C. § 740, which was applied without question in *Gutierrez* v. *Waterman S.S. Corp.*, 373 U.S. 206 (1963). See also *United States* v. *Matson Navigation Co.*, 201 F.2d 610 (9 Cir. 1953), cited with approval in *Victory Carriers, Inc.* v. *Law*, 404 U.S. 202, 209 n. 9 (1971), in which the Court stated that "if denying federal remedies to longshoremen injured on land is intolerable, Congress has ample power under Arts. I and III of the Constitution to enact a suitable solution." *Id.* at 216.[28] Most important of all are the statements in *Nacirema, supra*, 396 U.S. at 223, that "There is much to be said for uniform treatment of longshoremen injured while loading or unloading a ship," and the suggestion that Congress be invited to do something about this, *id.* at 397. The Court would scarcely have suggested this if it had entertained doubt as to the constitutionality of a Congressional response.

We thus see no reason to question the power of Congress to expand the concept of a maritime tort to include injuries suffered by persons on structures adjoining navigable waters in the course of employment related to ships. If we were more doubtful on the point than we are we would see no reason why the extension of coverage could not be predicated on the portion of the jurisdiction relating to maritime contracts, where there is no "locality" test. Contracts of employment relating to maritime matters are within that jurisdiction, *Sheppard* v. *Taylor*, 30 U.S. (5 Pet.) 675 (1831), and claims under LHWCA are by an employee engaged in "maritime employment" against an employer.

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[28] The Court has also sustained the Jones Act, which accords to seamen a remedy for injuries on land as well as on the sea, as an extension of the remedy of maintenance and cure. *O'Donnell* v. *Great Lakes Dredge & Dock Co.*, 318 U.S. 36, 40-41 (1943). If *Sieracki* retains any vitality, the constitutionality of the extension of coverage by the Amendments could be supported on this theory.

The petition to review in Dellaventura's case is dismissed as untimely and the petition in Scaffidi's case is dismissed on the ground that there no longer is a justiciable controversy between the employer and the employee. The petitions in Blundo's and Caputo's cases are denied on the merits.

Lumbard, Circuit Judge (concurring and dissenting):

I agree that Pittston's petition seeking review of the award in Scaffidi's case should be dismissed as there is no justiciable controversy by reason of the insurance carrier's payment of the award. I also agree that Pittston's petition to review Dellaventura's case should be dismissed as untimely filed.

With respect to the denial of the petitions in the Blundo and Caputo cases, I respectfully dissent. As the relevant considerations have been so ably and extensively set forth here by Judge Friendly and also by Judge Winter in I.T.O. of Baltimore v. Benefits Review Board, U.S. Dep't of Labor and Adkins, 529 F.2d 1080 (4th Cir. 1975), no purpose would be served in any further protracted discussion. I agree with Judge Winter that "[t]he 1972 extension of coverage was intended only to remove inequities and anomalies arising when a person otherwise engaged in 'maritime employment' was injured on land," 529 F.2d at 1081, and with his additional statement that ". . . with respect to longshoremen or other persons engaged in longshoring operations, the Amendments extend only to those employees engaged in loading and unloading activities between the ship and the first (last) point of rest, including checkers 'directly involved in [such] loading or unloading functions,'" 529 F.2d at 1088.

It is more in keeping with the realities of maritime employment to draw the line at the first point of rest in discharging the cargo and at the last point of rest in loading a vessel. Moreover, such a rule is far easier to apply and avoids claims such as that put forward by Dellaventura that he is entitled to compensation for his injury while loading a consignee's truck with coffee bags which had been stored in a warehouse for 133 days after being removed from the ship CAMPECHE. This being so, it seems to me that the interpretation adopted by the Fourth Circuit is more consistent with what the Congress intended and with the language of the 1972 amendment.

Blundo, a checker employed by I.T.O., was injured while checking cargo being removed from a container. The container was located on a stringpiece of the 19th Street pier in Brooklyn, had been unloaded a few days before at a different pier and had been trucked through the streets to the 19th Street pier to be opened there by United States Customs before the container was stripped. What Blundo did was done well after the container had been left at the first point of rest.

Caputo's principal duties related to terminal labor. When injured he was working at the northeast marine terminal on the Brooklyn waterfront inside the truck of a consignee, while helping the consignee's truck driver load boxes of cheese which had been discharged from a vessel at least five days before. Thus in Caputo's case his activity occurred after the boxes of cheese had come to rest on the pier.

For these reasons I would grant the petition and set aside the awards in the cases of Blundo and Caputo.